TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 351

L. B. JACKSON, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1943

CERTIORARI GRANTED OCTOBER 25, 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 361

L. R. JACKSON, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Civil Action No. 964-57 TC

FRANCES S. PARKER (formerly Frances S. Richards), Executrix of the Will of George A. Richards, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT FOR REFUND OF ESTATE TAX PAID
—Filed August 8, 1957

Plaintiff alleges as follows:

1. The Court has jurisdiction of this action under Title 28, United States Code Section 1346.

2. Plaintiff is the duly appointed, qualified and acting Executrix of the Will of George A. Richards, Deceased.

3. Pursuant to petition duly filed and heard, the Superior Court of the State of California, in and for the County of Los Angeles, did on June 30, 1952, order, adjudge and decree that plaintiff as Executrix as aforesaid "be and is hereby authorized and directed to pay the sum of $3,000.00 a month from the corpus of said decedent's estate to Frances S. Richards, individually, for her support and maintenance, beginning May 27, 1951, and continuing until further order of this Court, but not exceeding a period of 24 [fol. 2] months."

4. During the period from June 30, 1952, to May 31, 1953, plaintiff, as Executrix, paid to herself individually, for her support and maintenance, pursuant to the aforesaid order, sums equivalent to $3,000.00 a month for a period of 24 months, or a total of $72,000.00.

5. The payment to plaintiff individually of said $72,000.00 was duly authorized under the laws of the State of California and was reasonably required and actually expended during the settlement of the estate for the support and maintenance of plaintiff in her individual capacity as a dependent of decedent. The entire said $72,000.00 was paid from the corpus of decedent's estate.

6. United States Estate Tax Return for said decedent was duly filed with the Collector of Internal Revenue at Los Angeles, California, on August 25, 1952, and the tax shown due thereby, namely, $669,011.26, paid to said Collector of Internal Revenue on said date.

7. Schedule M of said Estate Tax Return claims as a deduction from the measure of Federal estate tax due by reason of decedent's death the aforesaid $72,000.00 of support and maintenance payments made to plaintiff individually from the corpus of decedent's estate. Said amount is claimed as a deduction in said return under the provisions of Section 812(e) of the 1939 Internal Revenue Code as amended.

8. Upon audit and review of said Estate Tax Return defendant disallowed the said $72,000.00 claimed as a deduction as aforesaid and in addition made other adjustments in the measure of said estate tax liability which are not now in issue.

9. On or about January 11, 1954, plaintiff paid to the District Director of Internal Revenue at Los Angeles, California, additional estate tax in the amount of $129,338.63, [fol. 3] plus interest thereon, which resulted from the disallowance of the said $72,000.00 as a deduction and the other adjustments made upon audit and review.

10. On or about August 8, 1955, the plaintiff duly filed a timely claim for refund of $46,811.34 of the amount so paid, plus interest. A true and correct copy of said claim for refund, marked Exhibit "A", is attached hereto and made a part hereof.

11. In the prosecution of the said claim for refund and of this action for refund plaintiff has retained the law firm of Flint & MacKay and has incurred obligations on behalf

of the Estate of George A. Richards, Deceased, for costs and expenses incurred and for the payment of reasonable fees to her said attorneys for professional services rendered in connection with such attempted recovery of tax paid.

12. The amount of plaintiff's said obligation for costs, expenses and attorneys' fees is not now known and cannot be ascertained until the final determination and conclusion of these proceedings. Pursuant to applicable provisions of the Regulations of the Commissioner of Internal Revenue plaintiff asks that the court determine the amount of such costs, expenses and attorneys' fees which may be deducted in computing plaintiff's liability for Federal Estate Tax.

13. Pursuant to Notice of Adjustment, Form 1331, defendant on or about April 11, 1957, allowed plaintiff's said claim for refund to the extent of $6,441.18 of the amount claimed, plus interest of $1,778.24, or a total of $8,219.42, which said amount has been paid to plaintiff. Neither the support and maintenance payments of $72,000.00 nor any costs, expenses or attorneys' fees were allowed as deductions in determining the measure of estate tax due under said Notice or in computing the amount to be refunded thereunder.

[fol. 4] 14. On or about April 17, 1957, defendant sent to plaintiff, by registered mail, a statutory notice of disallowance under Internal Revenue Code Section 3772(a)(2), which disallowed plaintiff's claim for refund to the extent not previously allowed.

15. The addition to the estate tax liability of decedent's estate resulting from the disallowance of said $72,000.00 as a deduction from the measure of Federal estate tax is $29,520.00.

16. The reduction in the estate tax liability of decedent's estate which will result from the allowance as a further deduction of plaintiff's aforementioned costs, expenses and attorneys' fees is not now known.

17. Defendant acted illegally and erroneously in asserting, assessing and determining a deficiency in the estate tax properly payable by said estate and in demanding the

payment of said deficiency from plaintiff, plus interest, and in refusing to refund to plaintiff the amount so paid, plus interest thereon, for the following reasons:

(a) Plaintiff individually received and had the use of the said $72,000.00 as aforesaid, and all amounts received by plaintiff individually by reason of said decedent's death, including said $72,000.00, did not exceed in amount or value 50 per cent of decedent's "adjusted gross estate" as defined by I.R.C. Section 812(e) (1939 Internal Revenue Code as amended) and said $72,000.00 did in all other respects qualify as an allowable deduction in decedent's estate, pursuant to the requirements and provisions of said Section 812(e) and should be allowed as a deduction in computing Federal estate tax due by reason of decedent's death.

(b) Plaintiff's aforementioned costs, expenses and [fol. 5] attorneys' fees are properly allowable as an additional deduction in computing the measure of estate tax due by reason of decedent's death.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For the sum of $29,520.00, together with interest thereon at the rate of 6% per annum from August 25, 1952, to date of refund to plaintiff of said sum.

2. Such additional amount by which the Federal Estate Tax due by reason of the said decedent's death is reduced by the additional deduction allowable for plaintiff's costs, expenses and attorneys' fees, incurred in the prosecution of the above-mentioned claim for refund and of this action, together with interest thereon from August 25, 1952, to date of refund to plaintiff thereof.

3. For costs of suit incurred herein.

4. For such other and further relief as may be proper in the premises.

Frances S. Parker (formerly Frances S. Richards), Executrix of the Will of George A. Richards, Deceased, Plaintiff.

Flint & MacKay, By Paul Burks, Attorneys for Plaintiff.

[fol. 6]

EXHIBIT A TO COMPLAINT

Form 843
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised July 1953)

CLAIM

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

---

DISTRICT DIRECTOR'S STAMP
(Date received)

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps
ESTATE OF GEORGE A. RICHARDS, DECEASED
TYPE OR PRINT Frances S. Parker
(formerly Frances S. Richards), Executrix.
Street address
c/o Flint & MacKay, 458 South Spring Street
City, postal zone number, and State
Los Angeles 13, California

1. District in which return (if any) was filed
Los Angeles, California

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from ....., 19...., to ....., 19....

3. Kind of tax Estate Tax

4. Amount of assessment, $.....;
dates of payment .....

5. Date stamps were purchased from the Government .....

6. Amount to be refunded
Interest as provided by law plus $46,811.34

7. Amount to be abated (not applicable to income, estate, or gift taxes) ..... $

The claimant believes that this claim should be allowed for the following reasons:

See statement attached hereto, which said statement is made a part hereof by reference as though set forth at length.

(Attach letter-size sheets if space is not sufficient)

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed FRANCES S. PARKER
Frances S. Parker,
formerly
Frances S. Richards, as
Executrix of the Will of
George A. Richards,
Deceased

Dated August 2, 1955

(See Instructions on Other Side)

[fol. 7]

ESTATE OF GEORGE A. RICHARDS, DECEASED—
STATEMENT RE CLAIM FOR REFUND OF FEDERAL ESTATE TAX

That claimant, Frances S. Parker, formerly Frances S. Richards, is now and continuously since June 19, 1951, has been the duly appointed, qualified and acting Executrix of the Will of George A. Richards, Deceased, who died at Detroit, Michigan, on May 27, 1951. That at the time of his death said decedent was a resident of the County of Los Angeles, State of California, and that the probate proceedings in decedent's estate are under the jurisdiction of the Superior Court of the State of California, in and for the County of Los Angeles, as matter No. 318,771.

That claimant makes the within claim in her capacity as Executrix of the said decedent's will and alleges:

I

That pursuant to petition duly filed and heard the said Superior Court of the State of California, in and for the County of Los Angeles, did on June 30, 1952, order, adjudge and decree that claimant as Executrix as aforesaid "be and is hereby authorized and directed to pay the sum of $3,000.00 a month from the corpus of said decedent's estate to Frances S. Richards, individually, for her support [fol. 8] and maintenance, beginning May 27, 1951, and continuing until further order of this Court, but not exceeding a period of 24 months."

That during the period from June 30, 1952, to May 31, 1953, claimant, as Executrix, paid to herself individually, for her support and maintenance, sums equivalent to $3,000.00 a month for a period of 24 months, or a total of $72,000.00. That the payment to claimant individually of said $72,000.00 was duly authorized under the laws of the State of California and was reasonably required and actually expended during the settlement of the estate for the support and maintenance of claimant in her individual capacity as a dependent of decedent. That the entire said $72,000.00 was paid from the corpus of decedent's estate.

That United States Estate Tax Return for said decedent was duly filed with the Collector of Internal Revenue at

Los Angeles, California, on August 25, 1952, and the tax shown due thereby, namely, $669,011.26, paid to said Collector of Internal Revenue on said date. That Schedule M of said return claims as a deduction from the measure of Federal estate tax due by reason of decedent's death [fol. 9] the aforesaid $72,000.00 of support and maintenance payments made to claimant individually by decedent's estate. That said amount is claimed as a deduction in said return under the provisions of Internal Revenue Code Section 812(e) of the 1939 Internal Revenue Code as amended.

That said Federal Estate Tax Return was reviewed subsequent to the time of filing by representatives of the Internal Revenue Service and the said $72,000.00 claimed as a deduction as aforesaid was disallowed. Claimant resisted the inclusion of said $72,000.00 in the measure of tax, but to stop the running of interest on the additional estate tax alleged to be due did, on or about January 11, 1954, pay to the District Director of Internal Revenue at Los Angeles, California, additional estate tax in the amount of $129,338.63, together with interest thereon as required by law. That the said $72,000.00 was included in the measure of said additional tax.

That claimant individually received and had the use of the said $72,000.00 as aforesaid and that all amounts received by claimant individually by reason of said dece- [fol. 10] dent's death, including said $72,000.00, did not exceed in amount or value 50 per cent of decedent's "adjusted gross estate" as defined by I.R.C. Section 812(e) (1939 I. R. Code as amended) and that said $72,000.00 did in all other respects qualify as an allowable deduction in decedent's estate, pursuant to the requirements and provisions of said Section 812(e), and should be allowed as a deduction in computing Federal estate tax due by reason of decedent's death.

II

That claimant, as Executrix as aforesaid, paid Federal and California income taxes upon income received by decedent during his lifetime, together with interest on said

taxes, which amounts have not been allowed as deductions in the measure of estate tax paid herein. That the detail of said payments is as follows:

That by "90-day letter" dated March 12, 1953, the Commissioner of Internal Revenue proposed a deficiency of $109,262.56 in decedent's 1949 Federal income tax liability, together with interest thereon as provided by law. Claim- [fol. 11] ant did thereafter duly file a petition with The Tax Court of the United States protesting said proposed deficiency, which said proceeding bore Docket No. 49171. On April 1, 1954, said Court, pursuant to stipulation of the parties, ordered and decided that there was an income tax deficiency for said year, 1949, in the amount of $14,005.02. Said liability was that of decedent and due from decedent's estate, and claimant did, on or about May 19, 1954, pay from funds of the estate to the District Director of Internal Revenue at Detroit, Michigan, the said $14,005.02, plus interest thereon in the amount of $3,468.06, or a total of $17,473.08, in satisfaction of said deficiency. The portion of said interest payment attributable to the period from the due date of decedent's 1949 U. S. income tax return, March 15, 1950, to the date of decedent's death, May 27, 1951, is $1,008.32.

The State of California also alleged a deficiency in decedent's 1949 California income tax liability, which said alleged deficiency was settled by the payment of additional tax of $1,088.07 and interest of $307.38, a total of $1,395.45, which was paid to the State of California on or about [fol. 12] December 23, 1954. The portion of said interest payment attributable to the period from the due date of decedent's 1949 California income tax return, April 15, 1950, to the date of decedent's death, May 27, 1951, is $72.88.

That by reason of the foregoing claimant alleges that the measure of estate tax due by reason of decedent's death should be reduced by the following amounts:

Additional 1949 U. S. income tax	$14,005.02
Interest to date of death	1,008.32
Additional 1949 California income tax	1,088.07
Interest to date of death	72.88
TOTAL	$16,174.29

III

That a liability in an undetermined amount exists against claimant, as Executrix as aforesaid, for Arizona income tax due on income received by decedent during his lifetime, together with interest thereon. Said liability has not been allowed as a deduction in the measure of decedent's [fol. 13] estate tax. That claimant believes that said Arizona income tax, together with interest thereon to the date of decedent's death, will not exceed the sum of $1,000.00.

IV

That in the prosecution of the within claim claimant has obligated decedent's estate for the payment of fees to her attorneys, Flint & MacKay, of Los Angeles, California, and that pursuant to the provisions of Reg. 105, Sec. 81.34, does hereby request that such fees be allowed as an additional estate tax deduction in the measure of estate tax in the event claimant does not elect to claim them for income tax purposes. That the amount of such fees is not now known, for the reason that they will be based in a large measure upon the amount of time required in the prosecution of this claim. Claimant has no contingent or partially contingent fee agreement with her attorneys.

WHEREFORE, claimant prays:

1. Refund of Federal estate tax paid by her as Executrix of the Will of George A. Richards, Deceased, on the following amounts:

[fol. 14] (a) $72,000.00 of support and maintenance payments, as hereinabove set forth in paragraph I.

(b) $16,174.29 Federal and California income tax and interest thereon, as hereinabove set forth in Paragraph II.

(c) Arizona income tax and interest thereon to be paid, estimated at $1,000.00, as hereinabove set forth in paragraph III.

2. Further refund of Federal estate tax paid for attorneys' fees incurred in the prosecution of the within claim.

3. For such other and further relief as may be proper in the premises.

[fol. 15] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 964-57 TC Civil

[Title omitted]

ANSWER—Filed October 8, 1957

The United States of America answers the complaint by admitting, denying, and averring as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Admits the allegations contained in paragraph 2 of the complaint.

3. Denies, for lack of information sufficient to form a belief as to the truth thereof, the allegations contained in paragraph 3 of the complaint.

4. Denies, for lack of information sufficient to form a belief as to the truth thereof, the allegations contained in paragraph 4 of the complaint.

5. Denies, for lack of information sufficient to form a belief as to the truth thereof, the allegations contained in paragraph 5 of the complaint.

[fol. 16] 6. Admits the allegations contained in paragraph 6 of the complaint.

7. Admits the allegations contained in paragraph 7 of the complaint, but denies that plaintiff is entitled to a deduc-

tion for the sum of $72,000 under the provisions of Section 812(e) of the Internal Revenue Code of 1939.

8. Admits the allegations contained in paragraph 8 of the complaint.

9. Admits the allegations contained in paragraph 9 of the complaint, and avers that the interest paid by plaintiff to defendant consisted of a payment of $10,430.36 on December 18, 1953, and a further payment in the amount of $138.28 paid on May 14, 1954.

10. Admits the allegations contained in paragraph 10 of the complaint. With respect to said claim for refund, however, defendant denies all allegations of fact and conclusions of law contained in said claim, except to the extent expressly admitted herein.

11. Admits the allegations contained in paragraph 11 of the complaint.

12. Denies, for lack of information sufficient to form a belief as to the truth thereof, the allegations contained in paragraph 12 of the complaint.

13. Admits the allegations contained in paragraph 13 of the complaint, except denies the amounts set forth as refund of tax and interest, and avers that the notice of adjustment allowed plaintiff's claim for refund to the extent of $6,902.65 of the amount claimed, plus interest in the amount of $1,316.17, or a total of $8,218.82.

14. Admits the allegations contained in paragraph 14 of the complaint.

15. Defendant denies, for lack of information sufficient to form a belief as to the truth thereof at the present time, [fol. 17] the allegations contained in paragraph 15 of the complaint.

16. Admits the allegations contained in paragraph 16 of the complaint.

17. Defendant denies all allegations contained in paragraph 17, and its various subsections.

Wherefore, defendant demands judgment against the plaintiff and prays that it be awarded its costs in this action.

Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, John G. Messer, Assistant United States Attorney, Attorneys for Defendant.

[fol. 18] Affidavit of service by mail (omitted in printing).

[fol. 19] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 964-57-TC Civil

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT—Filed November 8, 1961

To the Plaintiff, Frances S. Parker and Her Attorneys:

You, and Each of You, Will Please Take Notice that on Monday, the 20th day of November, 1961, at 10:00 A.M., or as soon thereafter as counsel can be heard, in Courtroom No. 3, before the Honorable Thurmond Clarke, in the United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, the defendant, United States of America, by and through its attorneys herein mentioned, will make the following motion for summary judgment:

The defendant, United States of America, moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment against the plaintiff and in favor of the defendant on the grounds that there is no issue of material fact remaining to be tried and that

[fol. 20] defendant is entitled to a judgment as a matter of law as appears from the pleadings and admissions on file, and the Memorandum submitted herewith.

Dated: November 8, 1961.

Francis C. Whelan, United States Attorney, Robert H. Wyshak, Assistant U. S. Attorney, Chief, Tax Division, Loyal E. Keir, Assistant U. S. Attorney, Attorneys for Defendant, United States of America.

[fol. 21] Certificate of service by mail (omitted in printing).

[fol. 22] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 964-57-TC Civil

[Title omitted]

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—
Filed November 13, 1961

To Defendant, United States of America, and to Its Attorneys:

Please Take Notice that at 10:00 A.M. on Monday, November 20, 1961, or as soon thereafter as counsel may be heard, plaintiff, Frances S. Parker (formerly Frances S. Richards) as Executrix of the Will of George A. Richards, Deceased, will, at the hearing on defendant's Motion for Summary Judgment, oppose said motion and move the Court to dismiss said motion upon the following grounds:

1. That under Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted by the court only if there is "no genuine issue as to any material

fact and . . . the moving party is entitled to a judgment as a matter of law." That George A. Richards died May [fol. 23] 27, 1951. That paragraph 3 of plaintiff's complaint herein states:

> "3. Pursuant to petition duly filed and heard, the Superior Court of the State of California, in and for the County of Los Angeles, did on June 30, 1952, order, adjudge and decree that plaintiff as Executrix as aforesaid 'be and is hereby authorized and directed to pay the sum of $3,000.00 a month from the corpus of said decedent's estate to Frances S. Richards, individually, for her support and maintenance, beginning May 27, 1951, and continuing until further order of this Court, but not exceeding a period of 24 months.'"

Upon a trial of this matter plaintiff is prepared to prove that at the time said Order was made on June 30, 1952, decedent's widow was then entitled to receive 14 monthly payments of $3,000.00 each for her support and maintenance, or a total of $42,000.00. That under the rule of *Estate of Michael J. Rudnick*, 36 T, C. ——, No. 105, filed September 15, 1961, it would appear that plaintiff, as Executrix of the Will of George A. Richards, deceased, is entitled to a refund of federal estate tax measured by the said $42,000.00 right which accrued to her upon the making of the aforementioned June 30, 1952, Order. Under the rule of *In re Lux*, 114 Cal. 73, the widow's right to said $42,000.00 was not a terminable interest within the rule of *Estate of Edward A. Cunha*, 30 T. C. 812, 279 F.2d 292, cert. den. 364 U. S. 942.

2. That a total of $72,000.00 in family allowance payments were made from the Estate of Richards to the decedent's widow. That with reference to the $30,000.00 of such payments not included in the aforesaid $42,000.00, the right to which had accrued at the time the court's order was made, plaintiff would appear to be entitled, under Rev. Rul. 56-26, [fol. 24] 1956-1 C.B. 447, to show the portion of said $30,000.00 which went to decedent's widow under the provisions of decedent's will and establish a right to refund of estate tax paid on such portion of said remaining $30,000.00. That

the determination of the portion of said $30,000.00 which decedent's widow received under decedent's will is a material issue of fact which can be established only upon the presentation of proof by plaintiff.

3. That plaintiff is informed and believes, and upon such information and belief alleges that there are other material issues of fact which should be established on the trial of this matter which are relative to plaintiff's right to recover as prayed by her complaint.

In support of the foregoing, a Memorandum of Points and Authorities is attached hereto. Reference is also made to the pleadings and other documents on file in this action.

Dated this 13th day of November, 1961.

Flint & MacKay, Paul Burks, John C. Argue, By Paul Burks, Attorneys for Plaintiff.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 964-57-TC Civil

HONORABLE THURMOND CLARKE, JUDGE PRESIDING

FRANCES S. PARKER (formerly FRANCES S. RICHARDS), Executrix of the Will of GEORGE A. RICHARDS, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS—November 20, 1961

Los Angeles, California.

APPEARANCES:

Attorneys for Plaintiff: Flint & MacKay, Paul Burks, John C. Argue, By: Paul Burks, 458 South Spring Street, Los Angeles 13, California, Telephone: MAdison 7-3114;

[fol. 26] Attorneys for Defendant: Francis C. Whelan, United States Attorney, Robert H. Wyshak, Assistant United States Attorney, Chief, Tax Division, Loyal E. Keir, Assistant United States Attorney, By: Loyal E. Keir, Assistant United States Attorney, 808 Federal Building, Los Angeles 12, California, Telephone: MAdison 5-7411, Extension 547.

[fol. 27] (The Court hears other matters.)

The Clerk: No. 10 on the calendar, Frances S. Parker vs. United States of America.

COLLOQUY BETWEEN COURT AND COUNSEL ON MOTION FOR SUMMARY JUDGMENT

Mr. Burks: Ready for the Plaintiff. I am Paul Burks.

The Court: Yes. Mr. Burks, we have had you down here for quite a while. How are we doing now? You still have your motion for summary judgment.

Mr. Burks: It is Mr. Keir's motion, not mine.

The Court: Yes, I know. It is before the Court.

Mr. Burks: I think there are two matters before the Court, the pre-trial and this motion for summary judgment.

The Court: Yes, that is right.

I will take it under submission. I will hear from you. Go right ahead.

Mr. Keir: If the Court please, this case or suit involves a suit for tax refund.

The Court: That is right.

Mr. Keir: It is a Federal Estate tax case and the only basic issue is a question of whether or not certain payments to the surviving spouse of the decedent, in the amount of $72,000, are proper tax deductions under Section 812(e) of the 1939 Internal Revenue Code. This case has been continued, your Honor.

[fol. 28] The Court: I know. We have been waiting for the Cunha decision.

Mr. Keir: Yes. It has been continued for a period of almost two years pending the outcome of the Cunha case and the Court of Appeals for this Circuit has finally spoken in the Cunha case and has held in that case that similar payments were not proper tax deductions. It based its decision on the California law as interpreted by the Supreme Court of California in the Blair case, which held that the surviving spouse's interest in such support payments constituted a terminable interest and therefore it was not deductible.

The taxpayer's application for certiorari to the Supreme Court of the United States was turned down earlier this year.

Since the Cunha case is now history, your Honor, and since the case here is indistinguishable, in our opinion, from Cunha, and since there is no real question of fact, and we concede that the $72,000 was paid, we feel that defendant's motion for summary judgment in this case should be granted under Rule 56.

The Court: I will hear from Mr. Burks.

Mr. Burks: I agree with Mr. Keir, your Honor, in what he has said, except for one thing. I think there are a number of technical reasons perhaps why this motion should be [fol. 29] denied; but, getting to the substance of it, there is a later case than the Cunha case, decided by the same Court that originally decided the Cunha case, namely, the Tax Court, in which that court recognizes the Cunha rule and says that as to amounts of family allowances which have become fixed, as to which the right has accrued, the Cunha rule doesn't apply. Now, that case is the Estate of Rudnick. It is a September 15, 1961 decision, and it is stated in the Opposition to the Government's Motion.

At the time the family allowance was granted in the Richards Estate, 14 $3,000.00 monthly family allowance payments had accrued. The decedent passed away in May of 1951, and the Superior Court's order was made in August of 1952.

Now, under the rule of the Estate of Lux, which is cited in memorandum of points and authorities attached to the Opposition to the Motion, I believe it is well established in California that where the family allowance payments were linked to a prior period, that that is a right which presently is vested in the widow or in the family, in this case the wic w; so that even if the widow were to pass away, her estate would receive the amount which had accrued up to the date of the order. In view of that, I think there is a very definite issue of fact here.

I don't think that a trial of this action should be required. [fol. 30] I think it should be possible for the Government and the Plaintiff to enter into a stipulation of all of the applicable facts and submit the matter on stipulation, a stipulated statement to the Court.

But I think that it would be a mistake for this court, in view of what I have said and for other reasons, too, that are mentioned in the Opposition to the Motion, to grant the Government's motion for a summary judgment.

Now, in the first place, this record is totally devoid of the facts. The Answer denies all of the material allegations of which I have spoken, and so Mr. Keir's motion today is essentially a demurrer; and in view of the Rudnick decision

and other decisions of the Tax Court and other Revenue rulings that are mentioned in the memorandum of points and authorities, it is the position of the plaintiff that Mr. Keir's motion is not well founded. Now, if the Court agrees with that, we are willing to continue the matter for any period that the Court would like to continue it, for the purpose of trying to work out a stipulation of facts with the United States Attorney's Office and submitting it to the Court on that stipulated statement.

The Court: I will see what he has to say.

Mr. Keir: May I answer counsel's contentions?

The Court: Yes, sir.

Mr. Keir: Your Honor, counsel's contention mainly is [fol. 31] that defendant's motion should be denied because of the decision of the Tax Court in the Rudnick case in 36 T.C. An analysis of that case indicates that the court did hold that the payments there did constitute a vested interest, that is, the payments to the surviving spouse, it did hold that they were a vested interest, not a terminable interest. But, your Honor, that case was based upon the proposition that under Massachusetts law, the local law of the State where the estate was probated, support payments pursuant to a court order had become final and constituted a vested interest. Now, that is extremely important, your Honor, namely, that the Tax Court did base its decision on what the local law held.

The local law of California, as interpreted by the Supreme Court of California in the Blair case, is that a surviving spouse's interest in support payments is a terminable interest. This is the law of California, which is very much different from the law of Massachusetts.

Therefore, we hold that the case cited by counsel not only is not opposed to the defendant's position but actually supports it.

Furthermore, your Honor, in determining at what point of time we should apply the local law, we cannot look at the date of the court order. As a matter of fact, the Government would concede for purposes of discussion that as [fol. 32] of the date in June, 1952, when the probate court entered an order for support, that the decedent's surviving spouse was then entitled to say $42,000.00. As a matter of

fact, for discussion purposes, we could concede that she was entitled to the entire $72,000.00. But our position is that in determining the nature of her interest, that is, as to whether it was vested or whether it was terminable, we have to look at the date of the decedent's death and not at the date of the court order. Now, in support of this, your Honor, and with the Court's indulgence, I would like to read an appropriate passage from the opinion of the Court of Appeals for the Ninth Circuit in the Cunha case bearing on this very point. The Court there says as follows:

> "The right to receive a widow's allowance must be characterized according to the attributes it possesses at the instant of the decedent's death. The Senate Report of 1948 states in this regard"—

And I should mention, your Honor, that the reason that the court here refers to the Senate Report of 1948 is that the law, the statutory section in the Internal Revenue Code of 1939 came into effect with the 1948 Revenue law; therefore, we can look to the Congressional statements as of that date. I go on with the statement:

> "The Senate Report of 1948 states in this regard that 'in determining whether an interest is a terminable [fol. 33] interest * * *, the situation must be viewed as at the date of the decedent's death.'

The court further said,

> "To identify the 'property' referred to in section 812(e)";

which is our Section,

> "as the 'assets actually paid to the widow out of the gross estate of the decedent, no more or no less,' as did the court in Quivey v. U. S."—

That is a case decided by the Federal Court for the District of Nebraska in 1959.

> —is to view the situation not as it existed 'as at the time of the decedent's death' but rather from a point

in time after the widow had been paid. The widow has only the right to apply for an allowance at the time of her husband's death, the right to an allowance itself not accruing until after a court order granting it."

Citing the Supreme Court decision in the Blair case.

"The right to receive payments terminates upon the death or remarriage of the widow and in any event upon completion of administration, and the right is personal to the widow and cannot be assigned or given away. * * * Such are the essential attributes of the right to an allowance in California, looked [fol. 34] at as of the time of the death of the surviving spouse's husband. Said attributes are not those one associates with the 'bundle of rights' ordinarily thought of as ownership."

To repeat, then, your Honor, under the law of California as interpreted by the Blair case and as applied in the Federal Tax case of Cunha, the interest which the surviving spouse received, whether it was $42,000 or $72,000, or any other sum, at any time after the decedent's death, was still a terminable interest, because you have to characterize this interest by viewing it as of the date of the decedent's death.

Now, there is one further argument made in counsel's brief filed with this Court and that is that the balance of thirty thousand dollars, that is the excess over the forty two thousand which the surviving spouse was entitled to as of the date of the court order, that that thirty thousand dollars conceivably could be deductible by viewing it as an amount to which the wife would be entitled under other provisions of the decedent's will.

Now, the Government would grant that if the surviving spouse were undeniably entitled to this thirty thousand dollars under the provisions of the decedent's will, that deduction should be allowed even though it might constitute [fol. 35] a terminable interest for purposes of Section 812(e). But, your Honor, I have here the original Federal Estate tax return filed by the Estate to which is attached a

certified copy of the Decedent's last will and testament. I propose to offer this in evidence as Defendant's Exhibit 1.

The Court: You may offer it at this time, and I will take the matter under submission.

Mr. Keir: Well, may I make a comment or two about this?

The Court: Yes.

Mr. Keir: And with the Court's permission, I would like to be able to have this withdrawn so I can substitute a photostatic copy.

The Court: All right.

Mr. Keir: Defendant's Exhibit 1.

The Court: It may be marked as an exhibit.

Mr. Keir: Yes.

The Court: Government's exhibit.

Mr. Keir: Your Honor, under the terms of the Decedent's last will and testament, the surviving spouse to whom these payments were paid was entitled to two basic interests; No. 1, she was entitled to receive the household furnishings of the personal type under item Third and she was also entitled to certain payments under a trust set up [fol. 36] under item Fourth.

It is the Government's contention that if this thirty thousand dollars is not allowable under Section 812(e), it could not possibly be allowed under any conceivable distribution pursuant to the decedent's will, because obviously it is not personal property like household furnishings, and even if it were paid under the trust provisions of item Fourth it would still be disqualified because the trust under item Fourth is a terminable interest.

Now, one last point, your Honor: In the Federal Estate tax return itself, Schedule M, which is entitled "Requests, etc., to Surviving Spouse (Marital Deduction)", there are three basic categories here of deductions, for the purposes of marital deductions. Item 1, in the amount of seventy one thousand plus relates to insurance on the decedent's life. Item 2, in the amount of eighty three thousand dollars plus relates to jointly held property; and item 3 is the deduction of $72,000.00 as support payments.

It is obvious that if the $72,000.00 is not deductible as support payments, they could not be deducted as jointly held property or as insurance.

Now, finally, your Honor, a comment on counsel's suggestion to the Court that this case could be submitted on a stipulation of facts; obviously it could, but, under Rule 56, [fol. 37] if there is no genuine controversy on any issues of fact, then, upon the filing of a motion under Rule 56, summary judgment may be granted.

It is our contention that there is no issue of fact. We concede, for all practical purposes, that the $72,000.00 was paid. We are placing in evidence the decedent's last will and testament and his Federal Estate Tax return. We are unaware of any other basic facts that must be submitted to the court in order to decide this case. We think that the Court can just as easily decide it under Rule 56.

Mr. Burks: May I be heard briefly, your Honor?

The Court: Yes, sir.

Mr. Burks: For the purpose of his motion, as I understand it, Mr. Keir is willing to concede that of this $72,000.00 that was paid to the decedent's widow, that $42,000.00 was paid after June 30, 1952 out of the corpus of the decedent's estate; is that right, Mr. Keir? You make that concession, is that correct?

Mr. Keir: That is right.

Mr. Burks: The first point that Mr. Keir made was that the situation had to be regarded as of the date of the decedent's death. Now, if that were true, your Honor, there couldn't be any family allowance payments which were deductible under the marital deduction provisions of the Federal Estate tax law.

[fol. 38] The fact is that in many states, as pointed out both in the Rudnick decision and in the Cunha case, family allowance payments are allowed for marital deduction purposes.

Now, it isn't known in that State any more than it is in California as at the date of the decedent's death whether or not there will be any family allowance. So that I think that any language in the Cunha decision of the Court of Appeals for the Ninth Circuit to that effect is at variance both with other decisions and with the rules of the Treasury Department itself.

The Senate Report to which Mr. Keir referred in effect said that the marital allowance was being eliminated as a

standard deduction but it would be allowed under the marital deduction provisions of the Estate tax laws; and any reference in the Senate Report to as of the date of death has an exception to it, either through Treasury rulings, through the law itself, or through these many decisions which have allowed family allowance payments under the marital deduction provisions of the Estate tax law. So, in that respect I think that Mr. Keir's basis for what he would like this Court to do is not well founded.

Mr. Keir hasn't responded to my suggestion that under the rule of the Estate of Lux, the situation in California is [fol. 39] the same as to this $42,000.00 which had accrued and to which the decedent's widow was entitled as of the time the order was made. Now, I am not speaking of the thirty thousand dollars which represented future payments. I really don't feel how this Court could do anything other than say that those payments don't qualify under the rule of Cunha, but I do say that under the rule of these other cases, the Treasury Department regulations and the Estate of Lux rule, that this was a sum to which the widow was entitled when the order was made and it is no different than a bequest under the deceased's will.

Now, if this issue is to be determined on a motion for summary judgment, I would like an opportunity to submit memorandum before any decision is reached, amplifying the arguments that I have made here today.

The Court: Well, I might give you permission to file that in written form, just what you have stated now.

Mr. Burks: I would like to, your Honor.

The Court: Do you want 20 days on that?

Mr. Burks: That will be fine, your Honor.

The Court: That will be 20 days for Mr. Burks. He wants to put in written form his opposition to your motion for summary judgment, within 20 days from now.

Mr. Keir: If your Honor please, will we have an opportunity of filing a memorandum in opposition to that?

[fol. 40] The Court: You want ten days to reply to it? In other words, there is no use for you to write a brief until you see what Mr. Burks is going to do.

Mr. Keir: Right.

The Court: I will give Mr. Burks 20 days and give you 10 days to reply.

Mr. Burks: Your Honor, may the plaintiff also have the opportunity to file affidavits, to the same effect as though they had been filed with the Court during this hearing?

The Court: Certainly.

Mr. Keir: Your Honor, there is one further technical point here which is not involved in this particular issue. There is a claimed deduction for attorneys' fees which we state could be substantiated by proof by counsel, and if the Court feels that it should render a summary judgment in connection with the principal issue, then the question of the attorneys' fees could be set down for hearing separately.

The Court: Well, you can put it in affidavit form.

Mr. Burks: I might suggest, your Honor, that as I understand Rule 56, if there is anything of that nature, that the motion should be denied because of the factual nature such as the amount of the attorneys' fees. Now, I don't think this matter should be decided on a motion for sum- [fol. 41] mary judgment, and I think technically that that one fact that attorneys' fees have not been determined is reason enough in itself to deny the motion. If it were any other proceedings, I would not—

The Court: Well, I will consider your views on the matter.

Mr. Keir: Your Honor, may I make one further comment. I want to take issue with counsel that summary judgment cannot be granted upon one issue. I think subsection (d) of Rule 56 grants the court full authority for giving judgment on this issue and leaving this other issue of fact as to attorneys' fees open for further disposition either by affidavit or upon hearing as requested by the court.

The Court: Well, the matter will stand submitted.

Mr. Keir: Thank you.

[fol. 42] Reporter's Certificate to foregoing transcript (omitted in printing.)

[fol. 43] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 964-57-TC Civil.

[Title omitted]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—January 18, 1962

This cause having come before the court for hearing on defendant's motion, pursuant to Rule 56, Federal Rules of Civil Procedure, for summary judgment; notice of which motion was filed November 8, 1961; and the matter having been argued and submitted for decision on January 17, 1962;

And it now appearing to the court that there is no issue of material fact remaining to be tried and that defendant is entitled to judgment as a matter of law (F.R. Civ. P. Rule 56; Estate of Cunha v. Commissioner, 279 F.2d 292 (9 Cir. 1960), cert. den. 364 U.S. 942 (1961));

It Is Now Therefore Ordered that defendant's motion for summary judgment is hereby granted.

It Is Further Ordered that findings of fact, conclusions of law and summary judgment in favor of defendant be prepared by the attorney for defendant and lodged with [fol. 44] the Clerk of the Court, pursuant to Local Rule 7, within five days.

It Is Further Ordered that the Clerk shall this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated January 18, 1962.

Thurmond Clarke, United States District Judge.

[fol. 45] [File endorsement omitted]

IN THE UNITED STATES DISTRICCT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 964-57-TC Civil.

FRANCES S. PARKER (formerly FRANCES S. RICHARDS), Executrix of the Will of GEORGE A. RICHARDS, Deceased, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND SUMMARY JUDGMENT ENTERED—January 31, 1962

The above matter having come on for hearing before this Court on defendant's motion for summary judgment, based on the pleadings and admissions on file, and the Memoranda of the parties, this Court having duly considered the matter, now makes its findings of fact, conclusions of law and enters judgment as follows:

Findings of Fact

1. Jurisdiction of the complaint in said action is conferred upon this Court by Title 28, United States Code, Section 1346.

2. Plaintiff is the duly appointed, qualified and acting executrix of the Will of George A. Richards, Deceased. At all times mentioned herein she was and now is a resident of the County of Los Angeles, State of California, within the jurisdiction of this Court.

[fol. 46] 3. Petitioner, as executrix, paid to herself individually, for her support and maintenance, a sum amounting to $72,000.00. Said sum was paid pursuant to

order of the Superior Court of the State of California, in and for the County of Los Angeles.

4. Plaintiff, as executrix, filed a timely claim for refund of the taxes sought to be recovered by the complaint, on the ground that the said $72,000.00 was deductible under §812(e) of the Internal Revenue Code of 1939 and that attorneys' fees and expenses incurred in the prosecution of this action were deductible under §812(b).

Conclusions of Law

1. This Court has jurisdiction of the parties and subject matter of this action.

2. The payments by plaintiff, as executrix, to herself individually for her support and maintenance, pursuant to order of the Superior Court of the State of California, in and for the County of Los Angeles, constitute a terminable interest and are not deductible for federal estate tax purposes under the provisions of §812(e) of the Internal Revenue Code of 1939, as amended.

3. The plaintiff is entitled to recover nothing from the defendant with respect to the issue of the deductibility for federal estate tax purposes of the payments to plaintiff individually for her support and maintenance.

Summary Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that on the issue of the deductibility for federal estate tax purposes of the payments to plaintiff individually for her support and maintenance, plaintiff recover nothing from defendant; [fol. 47] and that the Court retains jurisdiction of this action for the purpose of determining the amount of any deduction for federal estate tax purposes to which plaintiff

is entitled for attorneys' fees and expenses incurred in the prosecution of this action, upon proof thereof to the Court.

Dated: January 31, 1962.

Thurmond Clarke, United States District Judge.

[fol. 48] Certificate of service by mail (omitted in printing).

[fol. 49] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 964-57-TC Civil.

L. R. JACKSON and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. Richards, Deceased; FRANCES S. CARTMELL (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL—Filed March 29, 1962

Notice Is Hereby Given that L. R. Jackson and Bank of America National Trust and Savings Association, as Trustees under the Will of G. A. Richards, Deceased; Frances S. Cartmell (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent, plaintiffs above named, appeal to the United States Court of Appeals for the Ninth Circuit from the summary judgment entered in this action on January 31, 1962.

The names of the parties to this judgment and the names and addresses of their respective atorneys of record are: L. R. Jackson and Bank of America National Trust and Savings Association, as Trustees under the Will of G. A. [fol. 50] Richards, Deceased; Frances S. Cartmell (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent, plaintiffs herein, who are represented by Flint & MacKay, Paul Burks and John C. Argue, at 458 South Spring Street, Los Angeles 13, California; United States of America, defendant herein, who is represented by Francis C. Whelan, United States Attorney, Robert H. Wyshak, Assistant United States Attorney, Chief, Tax Division, Loyal E. Keir, Assistant United States Attorney, 808 Federal Building, Los Angeles 12, California.

Dated: March 27, 1962.

Flint & MacKay, Paul Burks, John C. Argue, By Paul Burks, Attorneys for Plaintiffs, 458 South Spring Street, Los Angeles 13, California.

[fol. 52] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 53]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,128

L. R. JACKSON and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. RICHARDS, Deceased; FRANCES S. CARTMELL (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division

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OPINION—May 15, 1963

Before: CHAMBERS, BARNES AND JERTBERG, Circuit Judges.

JERTBERG, Circuit Judge:

George A. Richards, a resident of the County of Los Angeles, State of California, died testate on May 27, 1951, leaving surviving him his widow, Frances S. Richards, and a daughter, Rosene Richards Moore. On June 19, 1951, the decedent's will was duly admitted to probate and his widow qualified as executrix of the last will of decedent.

The decedent by his will and the codicils thereto, after bequeathing to his wife personal property consisting of jewelry, automobiles, personal effects, household furniture, etc. and after making certain pecuniary bequests, left the residue of his estate to trustees in trust. The trustees were required to pay the income of the trust to his daughter for her life after the payment of specific income payments to his sisters and a sister-in-law. His wife was entitled under

the terms of the will to income of the trust after the death [fol. 54] of the daughter if she survived the daughter. It was further provided that upon the death of the survivor of his wife or daughter, the trust was to terminate excepting the retention of sufficient principal to fulfill the income bequests to his sisters and a sister-in-law if any of them survived the death of both his daughter and wife. The remainder, if his daughter survived his wife, was to pass to the issue of the daughter, but if she had no issue and did not exercise a power of appointment granted her, then to his heirs. In the event his wife survived the daughter, the remainder was to pass according to the provisions of her will, but if no provision was made therein, then to the issue of his daughter, and if the latter had no issue, then to his heirs.

On June 30, 1952, pursuant to Section 680 of the Probate Code of California, the Superior Court of the State of California, in and for the County of Los Angeles, ordered that the executrix be authorized and directed to pay to herself individually as the surviving spouse of the decedent the sum of $3,000.00 a month from the corpus of the decedent's estate for her support and maintenance beginning May 27, 1951 and continuing until further order of the court, but not exceeding a period of 24 months.

As of the date of the court order, June 30, 1952, $42,000.00 in family allowance was due and payable to the widow. Said sum and an additional sum of $30,000.00, or a total of $72,000.00, were in fact paid to the widow from the corpus of the estate.

On August 25, 1952, the executrix filed a Federal Estate Tax Return on behalf of the estate, and the tax shown thereon was paid. On said return the executrix claimed a deduction, under Section 812(e) of the Internal Revenue Code of 1939, as Amended (the Marital Deduction provisions), of said $72,000.00. The Internal Revenue Service, upon audit, disallowed said deduction. The executrix paid the additional tax, together with interest thereon, which resulted from the disallowance of said deduction. Following disallowance of a claim for refund, the executrix filed suit for refund of Federal Estate Tax in amount of $29,500.00,

plus interest, and for such additional amount by which the Federal Estate Tax due by reason of decedent's death might be reduced by the executrix's costs, expenses and attorney fees incurred in the prosecution of said claim for refund, and the court action to recover the same plus interest thereon.

[fol. 55] The district court granted the motion of the United States for a summary judgment in its favor, holding that the amount paid for family allowance was not deductible for Federal Estate Tax purposes under Section 812(e) of the Internal Revenue Code of 1939, as Amended.

On this appeal the taxpayer contends that the District Court erred in holding that the sum of $42,000.00 which was due and payable and paid on the date of the court order to the widow for her support and maintenance was not deductible under Section 812(e) of the 1939 Code, as Amended. In this connection it should be stated that the taxpayer makes no contention that the amount of $30,000.00 in family allowance which accrued and was paid to the widow after June 30, 1952, the date of the court order, is deductible. In fact, taxpayer in its brief states:

> "Only that portion of the allowance to the widow for the period from the date of the decedent's death to the date of the court order is involved. The question presented is whether the $42,000.00 total of family allowance payments which were due and payable on the date of the court order were vested and thus deductible under the Marital Deduction provisions of the Internal Revenue Code."

Section 812(e) of the Internal Revenue Code of 1939, as Amended, provides a marital deduction in computing the Federal Estate Tax.[1] The terminable interest provisions

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[1] § 812 (e). Bequests, etc., to surviving spouse.

"(1) Allowance of marital deduction.

"(A) In general. An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 53 Stat. 123,

of Section 812(e)(1)(B) of the 1939 Code were carried over into Section 2056(b) of the 1954 Code without any substantial change.

[fol. 56] There is no dispute between the parties that the right to widow's allowance is an interest in property passing from the decedent within the meaning of Section 812(e)(3) and that the terminable interest rule stated in Section 812(e)(1)(B) is applicable thereto.

There is likewise no dispute between the parties that by the terms of the decedent's will and codicils thereto, the interest in property passing which is under review meets the conditions set forth in Section 812(e)(1)(B)(i) and (ii). Hence, if such interest is a terminable interest within the meaning of Section 812(e) the amount of the value of such interest is not an allowable marital deduction. The critical question, therefore, before us is whether such interest will terminate or fail.

Before attempting to solve such question, we must determine the nature or character of a widow's right to receive an allowance from her deceased husband's estate. Such determination must be made in accordance with local law. See *Estate of Edward A. Cunha* v. *C.I.R.*, 279 F.2d 292 (9th Cir. 1960), *cert. denied* 364 U.S. 942 (1961); *United States* v. *First National Bank and Trust Company of Augusta*, 297 F.2d 312 (5th Cir. 1961); *United States* v. *Quivey*, 292 F.2d 252 (8th Cir. 1961); *United States Nat. Bank of Portland* v. *United States*, 188 F.Supp. 332 (1960);

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as amended by Revenue Act 1948, c. 168, § 361(a), 62 Stat. 110, 26 U.S.C.A. § 812(e).

"(B) Life estate or other terminable interest. Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse * * *"

Estate of William A. Landers, Sr. v. *C.I.R.*, 38 T.C. No. 83 (Sept. 13, 1962); *Estate of Margaret R. Gale*, 35 T.C. 215 (1960); *Estate of Proctor D. Rensenhouse*, 31 T.C. 818 (1959), on remand 252 F.2d 567 (6th Cir. 1958).

Under California law a widow is entitled to a reasonable allowance out of her deceased husband's estate for her maintenance during the progress of the settlement of the estate and which allowance, in the discretion of the court, may take effect from the date of death.[2] The right to a widow's allowance is purely statutory. *Hills* v. *Superior* [fol. 57] *Court*, 207 Cal. 266; *Estate of King*, 19 Cal.2d 354; *Estate of Blair*, 42 Cal.2d 728.

The right to a widow's allowance is not a vested right and nothing accrues before the order granting it. *Estate of Blair*, supra. The right to a family allowance is lost when the one for whom it is asked has lost the status upon which the right depends. *Estate of Blair*, supra. If a widow dies or remarries prior to securing an order for a widow's allowance, the right does not survive such death or remarriage. *Estate of Blair*, supra. The amount of widow's allowance which has accrued and is unpaid at the date of death of the widow is payable to her estate, but the right to future payments abates upon her death. *In re Lux*, 114 Cal. 73. The remarriage of a widow subsequent to an order for allowance abates her right to future payments. *Estate of Hamilton*, 66 Cal. 576. A widow's allowance ordered by the Probate Court is payable out of the assets of the estate, in preference to all other charges ex-

[2] Section 680 of the Probate Code of the State of California provides:

"The widow, widower, minor children, and adult children who have been declared incompetent by order of court are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent."

cept funeral charges, expenses of last illness and expenses of administration. *Estate of King*, supra. *Estate of Cunha*, supra.

The June 30, 1952 order of the Probate Court decreed that the widow be paid the sum of $3,000.00 a month from the corpus of the decedent's estate for her support and maintenance, beginning May 27, 1951, and continuing until further order of the court but not exceeding a period of twenty-four months.

The taxpayer concedes that the right to receive an allowance accruing under the court order, after the date thereof, would terminate or fail upon the occurrence of an event or contingency, i.e. the death or remarriage of the widow. It is clear that should either of said events or contingencies occur, the interest in question would not in all events go to the widow or her estate.

[fol. 58] However, the taxpayer contends that the right to receive the allowance which accrued on the date of the court order was vested in the widow by such order since neither her death or remarriage would operate to divest her, or her estate, of the right to collect the same from the estate.

The United States takes issue with the taxpayer's position on alternate grounds. Its first position is that in determining whether an interest in property is a terminable interest and whether the conditions set forth in Section 812(e)(1)(B)(i) and (ii) are met, the situation must be viewed as of the date of decedent's death, and cites in support of such position *Estate of Cunha*, supra; *United States* v. *Quivey*, supra, other authorities and legislative history. The alternate position of the United States is that, even assuming the situation is to be viewed as of the date of the court award, the interest in property under review is still a terminable interest.

We are unable to embrace the appellant's contention for two reasons. In the first place, the right to receive a widow's allowance in the instant case was a right to receive the same in monthly installments during the progress of the settlement of the estate, which period by court order commenced on the date of decedent's death and extended for a period of twenty-four months. The right to receive the

allowance for the specified period is the interest in property passing from the decedent to his widow which is here under review. To uphold the appellant's contention would require us to hold that the interest in property passing may be fractionalized in the manner suggested by appellant into two interests—one vesting at the date of the court order, and the other interest not vesting—by the happenstance of the date of the court order in relation to the date of decedent's death. *Section 680, Probate Code,* supra, contemplates one order for family allowance during the progress of the settlement of the estate but limited in time by the court order. Under the section such order may be made at any time after the granting of letters of administration or letters testamentary. Under appellant's contention, if the court order in question had been made one month after date of death, only one month's allowance would vest and the monthly allowance for the remaining twenty-three months would not, and if the court order had been made at the end of the twenty-four months fixed in the court order, the [fol. 59] entire interest vests. No decision cited to us supports the bifurcation suggested by appellant.

In the second place it appears to us that to hold that the monthly installments which accrued on the date of the court order constituted a vesting of the interest in property passing would be contrary to the holding of this court in *Cunha,* supra, that "the term 'property' used in Section 812(e) as applied to a widow's allowance in California, refers to the assets of the estate and not to the right to receive the allowance." See pages 297-298.

Assuming, without deciding, that the terminable character of such interest must be determined at the date of the court order [in the instant case, made ten months before the expiration of the period] rather than at the date of decedent's death, we hold that the interest in property passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow.

In this case the interest which passed from the decedent to his widow was in the corpus of the decedent's estate in which another interest had passed to decedent's daughter. If for any reason the widow's right to the marital allowance failed, it would not have gone in all events to her estate

but it would have served to augment the residuary estate in which the widow had only a limited and terminable interest. In such event a part of such property could be possessed and enjoyed by the daughter. See *Meyer* v. *United States*, 364 U.S. 410 (2nd Cir. 1960).

The judgment of the District Court is affirmed.

CHAMBERS, Circuit Judge, concurring:

I am unhappy with the above result. But Judge Jertberg's opinion convinces me that I must be unhappy with the statute which I think should be changed. And that, I suppose, is none of my business.

[File endorsement omitted]

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,128

L. R. JACKSON and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—May 15, 1963

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 15, 1963.

[fol. 61] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 361—October Term, 1963

L. R. JACKSON, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 28, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 361

L. R. JACKSON AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. Richards, Deceased; and FRANCES S. CARTMELL (formerly Frances S. Richards and Frances S. Parker), as Executrix of the Will of said decedent,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1963.

No.

L. R. JACKSON AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. Richards, Deceased; and FRANCES S. CARTMELL (formerly Frances S. Richards and Frances S. Parker), as Executrix of the Will of said decedent,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 15, 1963.

Opinions Below.

The opinion and concurring opinion of the United States Court of Appeals for the Ninth Circuit printed in Appendix A, *infra*, pp. 1a-10a are reported in .... F. 2d ..... The judgment of said court is printed in Appendix B, *infra*, p. 11a.

Jurisdiction.

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit were entered on May 15, 1963. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

The question presented by this petition is whether the Court of Appeals for the Ninth Circuit should have followed an earlier decision of the Court of Appeals for the Fifth Cirucit (*United States v. First National Bank & Trust Co. of Augusta*, 5 Cir. 1961, 297 F. 2d 312, Appendix E, *infra*, pp. 14a-24a and held that vested support payments to a California decedent's widow, which were paid from decedent's separate property, were allowable as a deduction under the Marital Deduction provisions (Sec. 812(e)) of the 1939 Internal Revenue Code, as amended, in computing the federal estate tax due by reason of the decedent's death.

Statutes Involved.

The provisions of Section 812(e) of the Internal Revenue Code of 1939, as amended, are set forth in Appendix C, *infra*, p. 12a. The provisions of Sections 680 through 682 of the California Probate Code are set forth in Appendix D, *infra*, p. 13a.

Statement.

George A. Richards, a fesident of the County of Los Angeles, California, died testate on May 27, 1951, leaving surviving his widow, Frances S. Richards, and a daughter, Rozene Richards Moore. Decedent's will was duly admitted to probate and on June 19, 1951, his widow duly qualified as executrix thereof.

On June 30, 1952, pursuant to Section 680 of the California Probate Code, the Superior Court of the State of California for the County of Los Angeles ordered that the executrix be authorized and directed to pay to herself individually, as surviving spouse of the decedent, the sum of $3,000 per month from the corpus of the estate for her support and maintenance, beginning as of May 27, 1951, and continuing until further order of the court, but not to exceed a period of 24 months.

On the date of said court order, June 30, 1952, $42,000 (14 monthly payments of $3,000 each) of support allowance was then due and payable to decedent's widow. Said $42,000 and an additional sum of $30,000, or a total of $72,000, was in fact paid to Mrs. Richards from the corpus of the estate, which was the separate property of the decedent.

On August 25, 1952, the executrix filed a Federal Estate Tax Return on behalf of the estate and paid the tax shown due thereby. On the Return the executrix claimed a deduction of the $72,000 support payments under Section 812(e) of the Internal Revenue Code of 1939, as amended (the Marital Deduction provisions). The Internal Revenue Service, upon audit, disallowed the deduction. The executrix then paid the additional tax, together with interest thereon, which resulted from the disallowance of the deduction, and filed a claim for refund therefor.

Following disallowance of the claim for refund, the executrix filed suit for refund. The United States moved for a summary judgment, and the United States District Court for the Southern District of California, Central Division, granted the motion, holding that none

of the support payments to decedent's widow were deductible under the Marital Deduction provisions of the Internal Revenue Code of 1939, as amended (Sec. 812(e)), in computing the estate tax. Taxpayer contended that not less than the $42,000 portion of the support payments which vested on the date of the court's order should be allowed as a deduction.

On the appeal to the United States Court of Appeals for the Ninth Circuit, the taxpayer urged that support payments which are vested in a surviving spouse do not constitute a terminable interest and should be allowed as a deduction under the Marital Deduction provisions. It was taxpayer's position, as held by the Court of Appeals for the Fifth Circuit in *United States v. First National Bank & Trust Co. of Augusta, supra,* that state law is determinative as to whether support payments are vested; that under California law a support allowance *which is due and payable as of the date of the court order granting it is indefeasibly vested* in the surviving spouse as of said date; that the date of the court order granting the support allowance is the applicable date for the determination of whether it is vested under the Marital Deduction provisions; that said rule gives effect to the expressed intent of Congress; and that in the instant case the $42,000 which was due and payable on the date of the court order was then vested in decedent's widow and should have been determined to be deductible under the Marital Deduction provisions.

In the Court of Appeals the United States contended that in determining whether an interest in property is a terminable interest under Section 812(e), the critical point of time is the instant of the decedent's death;

and, in the alternative, that viewing the situation as of the date of the court order, the widow's allowance in question was a terminable interest.

The Court of Appeals affirmed the decision of the District Court, concluding: "Assuming, without deciding, that the terminable character of such interest must be determined at the date of the court order . . . rather than at the date of decedent's death, we hold that the interest in property passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow." (p. 9a). The fact is that under California law decedent's widow's right to the $42,000 vested portion of the award would have survived her death or remarriage and would not have terminated. (*Estate of Blair v. Ruoff*, 42 Cal. 2d 728 (269 P. 2d 612 (1954)); *In re Lux*, 114 Cal. 73 (45 Pac. 1023 (1896); 1 Condee *California Probate Court Practice*, Sec. 464; *3 Bancroft's Probate Practice*, 2nd Edition, Sec. 732.)

Reasons for Granting the Writ.

1. The decision in the instant case is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. First National Bank & Trust Co. of Augusta, supra.* In the *First National Bank & Trust Co. of Augusta* case, the allowance in question was found to be vested in the widow on the date of the court order granting it under the applicable Missouri law (p. 315). In the instant case the allowance similarly vested in the widow on the date of the court order under the applicable California law. (*Estate of Blair v. Ruoff, supra; In re Lux, supra.*) The cases are not distinguishable, but the

widow's allowance was held to be deductible in the *First National Bank & Trust Co. of Augusta* case and not deductible by the decision of the Court of Appeals for the Ninth Circuit. The two decisions are in direct conflict.

The decision herein is also in conflict with a number of other decisions, including the following: *Estate of Oliver B. Avery v. Commissioner*, 40 T. C. No. 45; *Candler v. United States of America*, 61-2 USTC par. 12045, aff'd 303 F. 2d 439; *Estate of J. F. Darby v. Wiseman*, 62-2 USTC, 12,111; *Estate of Margaret R. Gale*, 35 T. C. 215 (Acq. I. R. B. 1962-37, 6); *King v. Wiseman*, 147 Fed. Supp. 156; *Estate of Wm. A. Landers*, 38 T. C. No. 83; *Molner v. United States of America*, 175 Fed. Supp. 271; *Estate of Wm. Paddock*, 20 T. C. M. 1350; *M. Phelps, Exrx. v. Bookwalter*, 210 Fed. Supp. 801; *United States v. Quivey*, CA-8 1961, 292 F. 2d 252; *Estate of P. D. Rensenhouse*, 31 T. C. 818, on remand, 6 Cir. 1958, 252 F. 2d 566; *Reynolds' Estate v. United States of America*, 189 Fed. Supp. 548; *Estate of Michael G. Rudnick*, 36 T. C. 1021 (Acq. I. R. B. 1962-26, 7). These cases are not distinguishable from the instant case and hold the widow's allowances in question to be deductible. In the instant case a vested allowance was held to be nondeductible, contrary to the decisions of these courts and of the Court of Appeals for the Fifth Circuit.

The decision herein is inconsistent with the general scheme of the Marital Deduction provisions which "Is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her [separate] estate, provided only that the terms of the transfer are such that the prop-

erty will be taxable in the estate of the surviving spouse." *Estate of Pipe v. Commissioner*, 23 T. C. 99, 104, affirmed, 2 Cir. 1957, 241 F. 2d 210, cert. den. 355 U. S. 814 (1957); *Estate of Michael G. Rudnick, supra; Estate of P. D. Reisenhouse, supra; United States v. First National Bank & Trust Co. of Augusta, supra.* The portion of the widow's allowance herein which was fully vested must (and did) pass to the surviving spouse and become a part of, and potentially taxable in, her estate. Under the general scheme of the Marital Deduction provisions, the $42,000 vested portion of the allowance should have been held deductible. (Senate Report No. 2375, 81st Congress, 2nd Session, 1950 U. S. Code Cong. Serv., Vol. 2, p. 3191.) *The view of the Court of Appeals herein would make few, if any, widow's support payments deductible and conflicts with the clearly expressed intent of Congress. (Estate of Wm. A. Landers, supra.)*

2. The conflict presented hereby is important and should be settled. The present situation is chaotic and results in great uncertainty and an appalling lack of uniformity in the application of the Marital Deduction provisions of the Federal Estate Tax Law, as evidenced by a review of the decisions in various jurisdictions. At present support allowances under the statutes of George, Illinois, Maine, Massachusetts, Michigan, Missouri and Oklahoma qualify for the marital deduction,[1]

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[1]Georgia—*United States v. First National Bank & Trust Co. of Augusta, supra; Estate of Candler v. United States, supra; Estate of Landers v. Commissioner, supra.*
Illinois—*Molner v. United States, supra.*
Maine—*Estate of Gale v. Commissioner, supra.*
Massachusetts—*Rudnick v. Commissioner, supra; Paddock v. Commisisoner, supra.*
Michigan—*Reynolds Estate v. United States, supra; Estate of*

whereas allowances under the laws of California, Iowa, Nebraska and Oregon statutes do not qualify.[2] The laws in these jurisdictions and the factual situations in the decisions cited are not substantially different or logically distinguishable.

3. Evidence of this judicial confusion is found in the uncertainty as to the date to which the vesting test should be applied. The Internal Revenue Service in the instant case takes the position that the critical point at which the vesting must be tested is the date of decedent's death, and in this connection cites the language in *Estate of Edward A. Cunha v. Commissioner*, 9 Cir. 1960, 279 F. 2d 292, that "The right to receive a widow's allowance must be characterized according to the attributes it possesses at the instant of the decedent's death." (p. 297). *The First National Bank & Trust Co. of Augusta* case and a number of other decisions, including *Estate of Rudnick, supra*, and *Estate of Gale, supra* (in which cases the Commissioner of Internal Revenue has acquiesced), and *Estate of Landers, supra*, hold that the widow's allowance must be examined as of the ". . . time that the interest arose,

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Rensenhouse v. Commissioner, supra.
Estate of Oliver B. Avery v. Commissioner, supra.
Missouri—*Phelps v. Bookwalter, supra.*
Oklahoma—*King v. Wiseman, supra; Estate of J. F. Darby v. Wiseman, supra.*

[2]California—*Cunha v. Commissioner, supra; Jackson v. United States*, 9 Cir. 1963, ___ F. 2d ___.
Iowa—*United States v. Shafer*, 8 Cir. 1961, 293 F. 2d 629.
Nebraska—*United States v. Quivey, supra.*
Oregon—*United States National Bank of Portland v. United States*, 188 Fed. Supp. 332.

treating that time as being at the time of the court award." (*First National Bank & Trust Co. of Augusta, supra,* p. 316.) The Court of Appeals for the Eighth Circuit in *United States v. Quivey, supra,* stated: "Viewing the situation as of the date of the decedent's death, as must be done for purposes of the marital deduction provisions, the widow had under the Nebraska statute a . . . ." (terminable interest). In the instant case the Court of Appeals assumes ". . . without deciding, that the terminable character of such interest must be determined at the date of the court order . . . rather than at the date of decedent's death . . ." (p. 9a).

An estate consisting of community property is taxed upon but one-half of support payments made to the surviving spouse. Congress by its 1950 amendment of the "family allowance" provisions (Section 812(e) of the Internal Revenue Code of 1939, as amended) intended to integrate the rule in separate property estates with the community property estate rule. If the failure of some courts to give effect to the clearly expressed intent of Congress is to be corrected, and the proper integration of separate and community estate taxation achieved, it is essential that this Honorable Court resolve the existing conflict between the Courts of Appeal for the Fifth and Ninth Circuits. Discrimination against support payments made from separate property estates has continued for too long.

For the reasons hereinabove stated, petitioners pray that this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit.

No. 18,128 May 15, 1963

L. R. Jackson and Bank of America National Trust and Savings Association, as Trustees under the Will of G. A. Richards, Deceased; Frances S. Cartmell (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent,

Appellants,

vs.

United States of America,

Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers, Barnes and Jertberg, Circuit Judges.

Jertberg, Circuit Judge:

George A. Richards, a resident of the County of Los Angeles, State of California, died testate on May 27, 1951, leaving surviving him his widow, Frances S. Richards, and a daughter, Rosene Richards Moore. On June 19, 1951, the decedent's will was duly admitted to probate and his widow qualified as executrix of the last will of decedent.

The decedent by his will and the codicils thereto, after bequeathing to his wife personal property consisting of jewelry, automobiles, personal effects, household furniture, etc. and after making certain pecuniary bequests, left the residue of his estate to trustees in trust.

The trustees were required to pay the income of the trust to his daughter for her life after the payment of specific income payments to his sisters and a sister-in-law. His wife was entitled under the terms of the will to income of the trust after the death of the daughter if she survived the daughter. It was further provided that upon the death of the survivor of his wife or daughter, the trust was to terminate excepting the retention of sufficient principal to fulfill the income bequests to his sisters and a sister-in-law if any of them survived the death of both his daughter and wife. The remainder, if his daughter survived his wife, was to pass to the issue of the daughter, but if she had no issue and did not exercise a power of appointment granted her, then to his heirs. In the event his wife survived the daughter, the remainder was to pass according to the provisions of her will, but if no provision was made therein, then to the issue of his daughter, and if the latter had no issue, then to his heirs.

On June 30, 1952, pursuant to Section 680 of the Probate Code of California, the Superior Court of the State of California, in and for the County of Los Angeles, ordered that the executrix be authorized and directed to pay to herself individually as the surviving spouse of the decedent the sum of $3,000.00 a month from the corpus of the decedent's estate for her support and maintenance beginning May 27, 1951 and continuing until further order of the court, but not exceeding a period of 24 months.

As of the date of the court order, June 30, 1952, $42,000.00 in family allowance was due and payable to the widow. Said sum and an additional sum of $30,000.00, or a total of $72,000.00, were in fact paid to the widow from the corpus of the estate.

On August 25, 1952, the executrix filed a Federal Estate Tax Return on behalf of the estate, and the tax shown thereon was paid. On said return the executrix claimed a deduction, under Section 812(e) of the Internal Revenue Code of 1939, as Amended (the Marital Deduction provisions), of said $72,000.00. The Internal Revenue Service, upon audit, disallowed said deduction. The executrix paid the additional tax, together with interest thereon, which resulted from the disallowance of said deduction. Following disallowance of a claim for refund, the executrix filed suit for refund of Federal Estate Tax in amount of $29,500.00, plus interest, and for such additional amount by which the Federal Estate Tax due by reason of decedent's death might be reduced by the executrix's costs, expenses and attorney fees incurred in the prosecution of said claim for refund, and the court action to recover the same plus interest thereon.

The district court granted the motion of the United States for a summary judgment in its favor, holding that the amount paid for family allowance was not deductible for Federal Estate Tax purposes under Section 812(e) of the Internal Revenue Code of 1939, as Amended.

On this appeal the taxpayer contends that the District Court erred in holding that the sum of $42,000.00 which was due and payable and paid on the date of the court order to the widow for her support and maintenance was not deductible under Section 812(e) of the 1939 Code, as Amended. In this connection it should be stated that the taxpayer makes no contention that the amount of $30,000.00 in family allowance which accrued and was paid to the widow after June

30, 1952, the date of the court order, is deductible. In fact, taxpayer in its brief states:

> "Only that portion of the allowance to the widow for the period from the date of the decedent's death to the date of the court order is involved. The question presented is whether the $42,000.00 total of family allowance payments which were due and payable on the date of the court order were vested and thus deductible under the Marital Deduction provisions of the Internal Revenue Code."

Section 812(e) of the Internal Revenue Code of 1939, as Amended, provides a marital deduction in computing the Federal Estate Tax.[1] The terminable interest provisions of Section 812(e)(1)(B) of the 1939 Code were carried over into Section 2056(b) of the 1954 Code without any substantial change.

There is no dispute between the parties that the right to widow's allowance is an interest in property passing

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[1] "§ 812 (e). Bequests, etc., to surviving spouse.

"(1) Allowance of marital deduction.

"(A) In general. An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 53 Stat. 123, as amended by Revenue Act 1948, c. 168, § 361(a), 62 Stat. 110, 26 U.S.C.A. § 812(e).

"(B) Life estate or other terminable interest. Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest, passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse * * *"

from the decedent within the meaning of Section 812(e)(3) and that the terminable interest rule stated in Section 812(e)(1)(B) is applicable thereto.

There is likewise no dispute between the parties that by the terms of the decedent's will and codicils thereto, the interest in property passing which is under review meets the conditions set forth in Section 812(e)(1)(B)(i) and (ii). Hence, if such interest is a terminable interest within the meaning of Section 812(e) the amount of the value of such interest is not an allowable marital deduction. The critical question, therefore, before us is whether such interest will terminate or fail.

Before attempting to solve such question, we must determine the nature or character of a widow's right to receive an allowance from her deceased husband's estate. Such determination must be made in accordance with local law. See *Estate of Edward A. Cunha v. C.I.R.*, 279 F. 2d 292 (9th Cir. 1960), *cert. denied* 364 U.S. 942 (1961); *United States v. First National Bank and Trust Company of Augusta*, 297 F.2d 312 (5th Cir. 1961); *United States v. Quivey*, 292 F.2d 252 (8th Cir. 1961); *United States Nat. Bank of Portland v. United States*, 188 F.Supp. 332 (1960); *Estate of William A. Landers, Sr. v. C.I.R.*, 38 T.C. No. 83 (Sept. 13, 1962); *Estate of Margaret R. Gale*, 35 T.C. 215 (1960); *Estate of Proctor D. Resenhouse*, 31 T.C. 818 (1959), on remand 252 F.2d 567 (6th Cir. 1958).

Under California law a widow is entitled to a reasonable allowance out of her deceased husband's estate for her maintenance during the progress of the settlement of the estate and which allowance, in the dis-

cretion of the court, may take effect from the date of death.[2] The right to a widow's allowance is purely statutory. *Hills v. Superior Court*, 207 Cal. 266; *Estate of King*, 19 Cal.2d 354; *Estate of Blair*, 42 Cal.2d 728.

The right to a widow's allowance is not a vested right and nothing accrues before the order granting it. *Estate of Blair*, supra. The right to a family allowance is lost when the one for whom it is asked has lost the status upon which the right depends. *Estate of Blair*, supra. If a widow dies or remarries prior to securing an order for a widow's allowance, the right does not survive such death or remarriage. *Estate of Blair*, supra. The amount of widow's allowance which has accrued and is unpaid at the date of death of the widow is payable to her estate, but the right to future payments abates upon her death. *In re Lux*, 114 Cal. 73. The remarriage of a widow subsequent to an order for allowance abates her right to future payments. *Estate of Hamilton*, 66 Cal. 576. A widow's

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[2]Section 680 of the Probate Code of the State of California provides:

"The widow, widower, minor children, and adult children who have been declared incompetent by order of court are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent."

allowance ordered by the Probate Court is payable out of the assets of the estate, in preference to all other charges except funeral charges, expenses of last illness and expenses of administration. *Estate of King*, supra. *Estate of Cunha*, supra.

The June 30, 1952 order of the Probate Court decreed that the widow be paid the sum of $3,000.00 a month from the corpus of the decedent's estate for her support and maintenance, beginning May 27, 1951, and continuing until further order of the court but not exceeding a period of twenty-four months.

The taxpayer concedes that the right to receive an allowance accruing under the court order, after the date thereof, would terminate or fail upon the occurrence of an event or contingency, i.e. the death or remarriage of the widow. It is clear that should either of said events or contingencies occur, the interest in question would not in all events go to the widow or her estate.

However, the taxpayer contends that the right to receive the allowance which accrued on the date of the court order was vested in the widow by such order since neither her death or remarriage would operate to divest her, or her estate, of the right to collect the same from the estate.

The United States takes issue with the taxpayer's position on alternate grounds. Its first position is that in determining whether an interest in property is a terminable interest and whether the conditions set forth

in Section 812(e)(1)(B)(i) and (ii) are met, the situation must be viewed as of the date of decedent's death, and cites in support of such position *Estate of Cunha*, supra; *United States v. Quivey*, supra, other authorites and legislative history. The alternate position of the United States is that, even assuming the situation is to be viewed as of the date of the court award, the interest in property under review is still a terminable interest.

We are unable to embrace the appellant's contention for two reasons. In the first place, the right to receive a widow's allowance in the instant case was a right to receive the same in monthly installments during the progress of the settlement of the estate, which period by court order commenced on the date of decedent's death and extended for a period of twenty-four months. The right to receive the allowance for the specified period is the interest in property passing from the decedent to his widow which is here under review. To uphold the appellant's contention would require us to hold that the interest in property passing may be fractionalized in the manner suggested by appellant into two interests—one vesting at the date of the court order, and the other interest not vesting—by the happenstance of the date of the court order in relation to the date of decedent's death. *Section 680, Probate Code*, supra, contemplates one order for family allowance during the progress of the settlement of the estate but limited in time by the court order. Under the section such order may be made at any time after

the granting of letters of administration or letters testamentary. Under appellant's contention, if the court order in question had been made one month after date of death, only one month's allowance would vest and the monthly allowance for the remaining twenty-three months would not, and if the court order had been made at the end of the twenty-four months fixed in the court order, the entire interest vests. No decision cited to us supports the bifurcation suggested by appellant.

In the second place it appears to us that to hold that the monthly installments which accrued on the date of the court order constituted a vesting of the interest in property passing would be contrary to the holding of this court in *Cunha*, supra, that "the term 'property' used in Section 812(e) as applied to a widow's allowance in California, refers to the assets of the estate and not to the right to receive the allowance." See pages 297-298.

Assuming, without deciding, that the terminable character of such interest must be determined at the date of the court order [in the instant case, made ten months before the expiration of the period] rather than at the date of decedent's death, we hold that the interest in property passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow.

In this case the interest which passed from the decedent to his widow was in the corpus of the decedent's

estate in which another interest had passed to decedent's daughter. If for any reason the widow's right to the marital allowance failed, it would not have gone in all events to her estate but it would have served to augment the residuary estate in which the widow had only a limited and terminable interest. In such event a part of such property could be possessed and enjoyed by the daughter. See *Meyer v. United States*, 364 U.S. 410 (2nd Cir. 1960).

The judgment of the District Court is affirmed.

Chambers, Circuit Judge, concurring:

I am unhappy with the above result. But Judge Jertberg's opinion convinces me that I must be unhappy with the statute which I think should be changed. And that, I suppose, is none of my business.

(Endorsed) Opinion and Concurring Opinion Filed May 15, 1963.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment.

United States Court of Appeals
for the Ninth Circuit.

No. 18,128

L. R. Jackson and Bank of America National Trust and Savings Association, et al.,

Appellants,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 15, 1963.

APPENDIX C.

Section 812(e) of the Internal Revenue Code.

Sec. 812. Net Estate.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(e) *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of Marital Deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ."

APPENDIX D.

California Probate Code.

Sec. 680. (Right to allowance: Who entitled: Necessity: Duration: Preference: Time of taking effect.) The widow, widower and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which in the case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

Sec. 681. (When may be granted: Power of court: Granting prior to inventory: Subsequent granting or modification: Hearing: Notice.) Such allowance may be granted before the inventory is filed, either by the court or a judge thereof; in which case it shall continue until modified by the court. After the inventory is filed the court may grant such allowance, or may modify any allowance made before the filing of the inventory, upon the petition of any person interested and a hearing after notice given for the period and in the manner required by section 1200 of this code.

Sec. 682. (Where parties have other support: Need for allowance as affecting granting thereof.) If the widow, widower, or any minor child has a reasonable maintenance derived from other property, and there are other persons entitled to a family allowance, the allowance shall be granted only to those who have not such maintenance.

APPENDIX E.

Conflicting Opinion.

United States of America,

Appellant,

v.

First National Bank and Trust Company of Augusta, as Executor under Will of J. Adolphus Setze,

Appellee.

No. 18894

United States Court of Appeals, Fifth Circuit. Dec. 13, 1961.

Bell, Circuit Judge.

This appeal involves estate taxes. It is from the judgment of the District Court for the taxpayer. It involves the narrow question of whether the allowance of a year's support to a widow under the law of Georgia in effect at the time of the death of decedent constitutes a terminable interest and thus does not qualify for the marital deduction under § 2056 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 2056.[1]

---

[1] 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(b) Limitation in the case of life estate or other terminable interest.—

"(1) General Rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

"(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; * * *."

The decedent died testate on May 26, 1955, a resident of Augusta, Georgia, leaving as survivors, among others, a wife. His will was duly probated and appellee bank qualified as executor. Under the term of the will decedent, after making specific bequests, left three-fourths of the residue of his estate in trust with the income to his wife for life with remainder to others. The will provided that the provisions made for the wife should not deprive her of the privilege of applying for a year's support for herself, and that any such allowance for her support should be charged to the principal of the estate.

On August 8, 1955, the widow made application under the statute[2] of Georgia to the Court of Ordinary of Richmond County, Georgia, for a year's support which was duly set apart to her by order of the court dated September 6, 1955. It consisted of certain bonds valued at $59,604.29 in the aggregate.

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[2]Ga. Code Section 113-1002 (1955 Supp.):

"Among the necesssary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided is the provision for the support of the family, to be ascertained as follows: Upon the death of any person testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children, or minor child or children only, it shall be the duty of the ordinary, on the application of the widow, or the guardian of the child or children, or any other person in their behalf, on notice to the representative of the estate (if there be one, and if none, without notice), to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of 12 months from the date of administration, in case there is administration on the estate, to be estimated according to the circumstances and standing of the family previous to the death of the testator or intestate and keeping in view also the solvency of the estate."

The executor, taxpayer and appellee herein, filed a Federal Estate Tax Return and included this sum as a part of the marital deduction. On disallowance, the taxpayer paid the resulting deficiency and filed a claim for refund, contending that the award qualified for the marital deduction. The claim was disallowed by the Commissioner of Internal Revenue. Thereafter, this suit was timely filed by the taxpayer and the District Court held that the award qualified for the marital deduction. 191 F. Supp. 446 (1961).

Section 2056(a) allows a marital deduction, subject to limitations not here applicable, in an amount equal to the value of any interest in property passing from the decedent to the surviving spouse in computing the federal estate tax, but the deduction is not permitted in cases where the widow receives an interest which will terminate or fail, and also pass to another person in the event the interest of the widow terminates or fails. § 2056(b).

The deduction here involved concerns the award of an interest in Georgia property under the Georgia statute, and hence it must be so examined to determine whether it will terminate or fail. It is undisputed that the interest of the widow under a year's support award in Georgia, once it is made, would not terminate or fail. The Georgia statute provides:

> "Where property is set apart as a year's support for the benefit of the widow alone, she shall thereafter own the same in fee, without restriction as to use, incumbrance, or disposition." Georgia Laws 1937, p. 861, § 113-1023, Georgia Code, 1933.

And in Hiers v. Striplin, 1954, 210 Ga. 293, 79 S.E. 2d 539, the Supreme Court of Georgia held that where property is set apart as a year's support for the benefit of the widow alone, as was the case here, the fee vests in her, and she can make a testamentary disposition of the unconsumed portion thereof.

Regarding the nature of the statutory right to a year's support as distinguished from the award, the court in Farris v. Battle, 1887, 80 Ga. 187, 7 S.E. 262, held it to be a branch of the statute of distribution, and that persons entitled to the right are just as much and as absolutely entitled thereto as they are entitled in the case of intestacy to a distributive share in the residue of the estate of a deceased person. And in Swain v. Stewart, 1896, 98 Ga. 366, 25 S.E. 831, the court said that the right to a year's support vests immediately and absolutely upon the death of the husband in the widow, and her marriage would not deprive her of the right. Also, the right survived her death and could be claimed by her legal representative. Smith v. Sanders, 1951, 208 Ga. 405, 67 S.E. 2d 229.

But the right is subject to certain limitations. It may be waived expressly or impliedly. Federal Land Bank of Columbia v. Henson, 1928, 166 Ga. 857, 144 S.W. 728; or lost by an election to take an inconsistent benefit, Ehrlich v. Silverstein, 1904, 121 Ga. 54, 48 S.E. 703, and it was held to be subject to a twenty year statute of limitation in Nixon v. Nixon, 1943, 196 Ga. 148, 149, 26 S.E. 2d 711; and in May v. Braddock, 1955, 92 Ga. App. 302, 88 S.E. 2d 539, although arising prior to the 1955 act barring the right by death or remarriage of the widow, an award was held to be void where the widow died pending the

award, but no doubt her legal representative could have claimed it. The statute was amended in 1953 to provide a seven year statute of limitation. Ga. Laws 1953, Jan.-Feb. Sess., p. 453.

At this juncture in the Georgia law, the government tacitly admits, the award of a year's support would qualify as a part of the marital deduction because the right was indefeasibly vested. But, says the government, the right is no longer vested because the statute was amended in 1955 to provide a bar to the right if the widow dies or remarries prior to its being set aside, or should she die twelve months after the date of the death of decedent and prior to the filing of an application for the award. Ga. Laws 1955, p. 626.[3]

This amendment is applicable here but we hold, as did the District Court, that it is merely adjective as were the existing limitations on the right, and not substantive so as to convert the right, admitted by the government to be therefore indefeasibly vested at the time of the death of the husband, to one that is defeasible.

We go further, however, in an effort to squarely meet the issue raised by the government, which rests on the assumption that the amendatory bar or limita-

---

[3]This legislation was sponsored by the Georgia Bar Association on recommendation of its committee on Real Property and Titles, which committee considered the resulting provisions of the Act to be at variance, and finally succeeded in clarifying the meaning by having it restated as a condition precedent to provide that all applications for year's support shall be made during life and widowhood. The purpose was to obtain a bar or limitation on the right. Ga., Laws 1958, pp. 665-666; Ga. Laws 1959, pp. 138-140; Reports, 72nd Sess. Ga. Bar Assoc., pp. 211-212; 73rd Sess., pp. 189, 193, 194; 76th Sess., p. 186. The 1958 Act also changed the statute of limitations from seven to three years.

tion is substantive. Simply stated, it is that the requirement that the widow be in life and widowhood is such an event or contingency within the meaning of § 2056(b) as will render the award terminable, even when it has been made and has under the statute vested indefeasibly.[4]

To reach this position it is necessary to consider the interest in property passing under § 2056(a) as being the statutory right of the widow to the award at the time of the death of the husband, rather than as being the interest in property itself, once it arises, which is upon the award by the court.

Certain confines have already been marked out by the courts relative to the meaning of § 2056 and its predecessor, § 812(e) of the Internal Revenue Code of 1939 as amended, as they relate to a widow's support allowance. It was first contended that such an allowance was not an interest in property passing from decedent as defined in these sections. Estate of Rensenhouse, 1956, 27 T.C. 107. On appeal, 6 Cir., 1958, 252 F. 2d 566, this position was abandoned by the government, and was not reasserted on remand to the tax court. 31 T.C. 818 (1960). In addition, the government acceded to the position that such an allowance is an interest passing from the estate of decedent within the meaning of the statute in Estate of Edward A. Cunha, 1957, 30 T.C. 812, affirmed 9 Cir., 1960, 279 F. 2d 292, cert. den. 1961, 364 U.S. 942, 81 S. Ct. 460, 5 L.Ed. 2d 373; Molner v. United

[4] That the widow may not assert her right to the award, or that it may be barred by the statute of limitation, or that it may be expressly or impliedly waived, or lost by an inconsistent election are not asserted as being such events or contingencies within the meaning of the statute.

States, D.C.N.D.Ill. 1959, 175 F. Supp. 271; Estate of Margaret R. Gale, 1960, 35 T.C. 215; Estate of Michael G. Rudnick, 1961, 36 T.C. No. 105; Estate of William Lamar Hailey, 1961, 36 T.C. No. 8; and most recently in United States v. Quivey, 8 Cir., 1961, 292 F. 2d 252. Cf. Reynolds' Estate v. United States, D.C. E.D. Mich. 1960, 189 F. Supp. 548; Rev. Rul. 83, 1953—1 Cum.Bull. 395; Rev. Rul. 56-26, 1956-1 Cum. Bull. 447.

Further the rule has been established that the question of the terminability of the interest or award is to be decided upon the law of the state where the interest arose, using the rule of examination of the interest at the time that interest arose, treating that time as being at the time of the court award.

In King v. Wiseman, D.C.W.D.Okl. 1956, 147 F. Supp. 156, a widow's allowance under the Oklahoma law was held not to terminate or abate upon the death or remarriage of the widow and did not constitute a terminable interest; in Quivey, supra, the examination was not made on the basis of the state law that the right was personal to the widow and did not survive her, but on the proposition that the interest or installment award for one year, once made, was terminable because it would fail in the event the widow died or the estate was settled in less than one year; in Estate of Margaret R. Gale, the award to the husband under the Maine law was vested in fee and was therefore nonterminable; and in Estate of Michael G. Rudnick, the widow's allowance under the Massachusetts law would not terminate or fail and thus it qualified as a part of the marital deduction.

As the Tax Court said in Gale:

> "If the allowance, once made, did fail under state law upon the happening or failure to happen of an event or contingency, it constitutes a terminable interest and is nondeductible. If the reverse is true, it is deductible."

Also in Gale and Rudnick, the Tax Court held the award not to be terminable and to qualify as a part of the marital deduction under § 2056(a) in spite of the fact that under the laws of the states involved, Maine and Massachusetts, the right was personal to the widow and would not survive her death, rendering it necessary for the award to be final before her death. The government took the express position in Rudnick that the interest was terminable because the right did not survive the widow. The Tax Court said that the award to the widow which became final before her death was thereby vested, and would become a part of her estate when she died, and the fact that the widow might die before the award became final would not make the award, once made, a terminable interest within the meaning of § 2056(b).

In Quivey, the Court of Appeals for the Eighth Circuit, while deciding for the government and thereby reversing the District Court, 176 F. Supp. 433, stated that all reported estate tax decisions on the question have expressly or implicitly recognized that only where a state statute does not leave a widow's allowance subject to termination can the interest in the decedent's estate qualify as a marital deduction. Georgia falls into this category, and meets this test as the Nebraska statute did not.

In United States v. Trader's National Bank of Kansas, 8 Cir., 1957, 248 F. 2d 667, the commuted cash value of dower and homestead interest, terminable interests under the Missouri law, was awarded to the widow on her election after the death of decedent under a Missouri statute and the court held this to be a nonterminable interest qualifying as a part of the marital deduction. In United States v. Crosby, 5 Cir., 1958, 257 F. 2d 515 a widow under the Alabama statute waived her dower interest in land so that it might be sold, and took an award, as she had a statutory right to do, in lieu of dower out of the proceeds of the sale, thereby converting her right from a terminable to a nonterminable interest which qualified as a part of marital deduction.

But the government, while recognizing that it is necessary to convert the statutory right into an award before it becomes an interest in property passing within the meaning of § 2056(a), would carve out an exception that it is a terminable interest where the state statute requires the widow to be in life and in widowhood to exercise the right.

This will not do. The right is inchoate. It is incapable of transfer or assignment, not subject to lien, or susceptible of valuation. The right holder has no control over the amount of the award under it. It must be claimed while the widow is in life and widowhood, and within the statutory period or it is barred, and it may be lost by taking an inconsistent benefit

or by waiver. Once claimed however, and reduced to certainty by the order of the court in the form of an award, it becomes the subject of examination in the light of state law to determine if it will terminate or fail within the meaning of § 2056(b) if it is claimed as a deduction under § 2056(a). By this standard we hold the Georgia award here to qualify as a marital deduction. It vested indefeasibly.

This accords with the intent of Congress to extend to married taxpayers in common law states by way of the marital deduction, more properly an exclusion, the advantages of residence in community property jurisdictions, but only when so much of the interest allowed as a marital deduction as is not used up will survive as an asset in the estate of the widow, there to be taxed in due course, and the statute is to be liberally construed to this end. The purpose of the terminable interest rule under § 2056(b) is to prevent the deduction of an interest which will not survive. United States v. Crosby, supra. Here the interest survives.

The application of the terminable interest rule to the maintenance allowance for a widow out of the estate of a decedent is entirely dependent, as was said in the concurring opinion in Quivey, on the vagaries of state law. The advantage given to residents of some states, such as Georgia, over those of other states such as California and Nebraska is inherent in the statute. The complexities of the marital deduction are compounded by the fact that every state has statutes of

varying forms designed to protect the decedent's family from economic hardship during the administration of estates. See Berlin and Testa, Deductibility of Widow's Allowance under the Marital Deduction, 36 N.Y.U.L.Rev. 1188 (1961). Congress is aware of this lack of uniformity in the application of the marital deduction,[8] itself created to promote uniformity, and the condition must continue until that body acts, it being their prerogative to make and amend laws. The judgment is

Affirmed.

[8]House Rep. No. 818, 86th Congress, 1st Sess., p. 2; House Rep. No. 1337, 83rd Congress, 2nd Sess., p. 91-2, and Senate Report No. 1622, 83rd Congress, 2nd Sess., p. 125.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 361

L. R. JACKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The relevant facts of the present case are set forth in the opinion of the Court of Appeals for the Ninth Circuit and in the petition for a writ of certiorari, which was timely filed.

1. The government does not believe that there is a square conflict among the courts of appeals on the deductibility of a widow's allowance such as was involved in this case. Rejecting the government's position that there can be no marital deduction for an award of a widow's allowance which, *at the time of the decedent's death*, was contingent upon the widow's survival or failure to remarry to the time of award, the Fifth Circuit has held that the widow's allowance

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should be considered *as of the time it is awarded* and that it is deductible if it is then a lump-sum payment subject to no further contingencies. *United States* v. *First National Bank and Trust Co. of Augusta*, 297 F. 2d 312. The Fifth Circuit neither held nor suggested, however, that the marital deduction would be available if some part of the allowance was, *at the date it was awarded*, still subject to such contingencies as the widow's death or remarriage. It carefully distinguished such cases involving a contingent right to periodic payments as *United States* v. *Quivey*, 292 F. 2d 252 (C.A. 8) and *Cunha's Estate* v. *Commissioner of Internal Revenue*, 279 F. 2d 292 (C.A. 9), from a case like that before it involving a right to a lump-sum payment which is absolute and subject to no contingencies once it has been awarded.

In the present case the Ninth Circuit held that it need not determine whether the deductibility of a widow's allowance should be decided as of the time of the decedent's death or as of the time of the award; for, even as of the time of the award, some part of the allowance in this case was subject to termination in the event of the widow's death or remarriage. The court below carefully refrained from passing on the deductibility of a lump-sum allowance which, at the time it was awarded, was subject to no contingencies but which, at the time of the spouse's death, had been subject to the contingencies of the widow's death or remarriage before the award was made.

We therefore believe that the Fifth Circuit has left itself entirely free to agree with the Ninth Circuit on the facts of a case such as this and the Ninth Cir-

cuit has, in this case, left itself equally free to follow the Fifth Circuit's decision in the *Bank of Augusta* case. There is accordingly no square conflict between the circuits.

2. The issue of the deductibility of widow's allowances under the marital deduction provisions of the Federal estate tax recurs frequently. The decisions of the lower courts are, if not in conflict, far from consistent in rationale and approach. As in the present case, exceedingly narrow distinctions have been made to reconcile the decisions. There is, moreover, a pervasive disagreement as to whether the deductibility of a widow's allowance should be determined as of "the instant of the decedent's death" (*Cunha's Estate* v. *Commissioner of Internal Revenue*, 279 F. 2d 292, 297) or "at the time of the court award" (*United States* v. *First National Bank of Augusta*, 297 F. 2d 312, 316) and most cases involving the deductibility of a widow's allowance can, if not must, turn on the resolution of this disagreement. For these reasons the government does not oppose the granting of the petition in this case, even though there is no square conflict among the courts of appeals.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

SEPTEMBER 1963.

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Supreme Court of the United States

October Term, 1963.
No. 361.

L. R. JACKSON AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. RICHARDS, Deceased; and FRANCES S. CARTMELL (formerly FRANCES S. RICHARDS and FRANCES S. PARKER), as Executrix of the Will of said decedent,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

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IN THE

Supreme Court of the United States

October Term, 1963.
No. 361.

L. R. JACKSON AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. RICHARDS, Deceased; and FRANCES S. CARTMELL (formerly FRANCES S. RICHARDS and FRANCES S. PARKER), as Executrix of the Will of said decedent,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

Opinions Below.

The opinion and concurring opinion of the United States Court of Appeals for the Ninth Circuit [R. 32, 39] are reported at 317 F. 2d 821 (C. A. 9, 1963).

Jurisdiction.

The Opinion and the Judgment of the United States Court of Appeals for the Ninth Circuit in this action were entered on May 15, 1963 [R. 32, 39]. The peti-

tion for a Writ of Certiorari herein was filed on August 12, 1963. The Petition was granted by Order Allowing Certiorari dated October 28, 1963 [R. 40]. The jurisdiction of this Court is based on 28 U. S. C. 1254 (1).

Question Presented.

The question presented by this review is whether the Court of Appeals for the Ninth Circuit erred in holding that support payments to a California decedent's widow paid from the corpus of decedent's estate (which was decedent's separate property in its entirety) did not qualify as a deduction under the marital deduction provisions (Section 812 (e)) of the 1939 Internal Revenue Code, as amended, in computing federal estate tax due by reason of the decedent's death.

Statutes Involved.

The provisions of Section 812 (e) of the Internal Revenue Code of 1939, as amended, are set forth in Appendix A, *infra*, p. 1. The provisions of Section 812 (b) (5) of the Internal Revenue Code of 1939, as amended, are set forth in Appendix B, *infra*, p. 3. The provisions of Sections 680 through 682 of the California Probate Code are set forth in Appendix C, *infra*, p. 4.

Statement.

George A. Richards, a resident of the County of Los Angeles, California, died testate on May 27, 1951, leaving his widow, Frances S. Richards, and daughter, Rozene Richards Moore, surviving him [R. 7]. Decedent's will was duly admitted to probate and on June 19, 1951, his widow qualified as executrix thereof [R. 1, 7].

On June 30, 1952, pursuant to Section 680 of the California Probate Code, the Superior Court of the State of California for the County of Los Angeles ordered that the executrix be authorized and directed to pay to herself individually, as surviving spouse of the decedent, the sum of $3,000 per month from the corpus of the estate for her support and maintenance, beginning as of May 27, 1951, and continuing until further order of the court, but not to exceed a period of 24 months [R. 1, 7].

On the date of the court order, June 30, 1952, support allowance in the sum of $42,000 (14 monthly payments of $3,000 each) was then due and payable to decedent's widow [R. 20]. Said $42,000 and an additional sum of $30,000, or a total of $72,000, was in fact paid to Mrs. Richards from the corpus of the estate, which was the separate property of the decedent [R. 4, 24]. The total of all amounts received by the surviving spouse by reason of decedent's death, including said payments of support allowance in the amount of $72,000, did not exceed fifty per cent of the value of decedent's adjusted gross estate [R. 4].

Executrix filed a timely Federal Estate Tax Return on behalf of the estate and paid the tax shown due thereby [R. 2, 7]. On the Return the executrix claimed a deduction of the $72,000 support payments under Section 812 (e) of the Internal Revenue Code of 1939, as amended (the marital deduction provisions) [R. 2, 8]. The Internal Revenue Service, upon audit, disallowed the deduction. The executrix then paid the additional tax, together with interest thereon, which resulted from the disallowance of said deduction, and filed a claim for refund therefor [R. 2, 8].

Following disallowance of the claim for refund, the executrix filed suit for refund [R. 1]. The United States moved for a summary judgment, and it was granted by the United States District Court for the Southern District of California, Central Division, holding that none of the payments of support allowance to decedent's widow were deductible under the marital deduction provisions of the Internal Revenue Code of 1939, as amended (Section 812 (e)), in computing the estate tax due [R. 29].

This decision was appealed to the United States Court of Appeals for the Ninth Circuit [R. 30], which in its opinion and concurring opinion filed May 15, 1963, affirmed the judgment of the District Court [R. 32].

Summary of Argument.

In the District Court the taxpayer contended that the entire $72,000 of support allowance paid to the decedent's widow should be allowed as a deduction under the marital deduction provisions and that in any event not less than the $42,000 portion of the support payments which vested on the date of the court's order should be so allowed. Counsel for the United States conceded that the $42,000 portion of the support payments which were payable on the date of the court's order then vested in the widow [R. 20]. On appeal to the United States Court of Appeals for the Ninth Circuit it would have been presumptuous of taxpayer to urge that the entire $72,000 paid to decedent's widow should be allowed as a deduction, in the face of that court's decision in *Estate of Edward A. Cunha v. Commissioner*, 279 F. 2d 292 (C. A. 9, 1960). Taxpayer did urge in the Court of Appeals that support payments which are *vested* in a surviving spouse do not

fall within the scope of the decision in *Estate of Cunha, supra,* and are not a terminable interest and should be allowed as a deduction under the marital deduction provisions. It was taxpayer's position, as held by the Court of Appeals for the Fifth Circuit in *United States v. First National Bank & T. Co. of Augusta,* 297 F. 2d 312 (C. A. 5, 1961), that state law is determinative as to whether support payments are vested; that under California law a support allowance which is due and payable as of the date of the court order granting it is indefeasibly vested in the surviving spouse as of said date; that the date of the court order granting the allowance is the applicable date for the determination of whether it is vested under the marital deduction provisions; that said rule gives effect to the expressed intent of Congress; and that in the case at bar the $42,000 which was due and payable on the date of the court order was then vested in decedent's widow and should have been held to be deductible under the marital deduction provisions.

At the argument in the Court of Appeals, counsel for the United States conceded that the $42,000 portion of the award was vested, but contended, that in determining whether an interest in property is a terminable interest under Section 812 (e), the critical point in time is the instant of the decedent's death; and, in the alternative, that viewing the situation as of the date of the court order, the widow's allowance in question was a terminable interest. The Court of Appeals affirmed the decision of the District Court, concluding: "Assuming, without deciding, that the terminable character of such interest must be determined at the date of the court order . . . rather than at the date of decedent's death, we hold that the interest in property

passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow" [R. 38].

Under California law decedent's widow's right to the $42,000 vested portion of the award would have survived her death or remarriage and would not have terminated (*Estate of Blair v. Ruoff*, 42 Cal. 2d 728 (269 P. 2d 612 (1954); *In re Lux*, 114 Cal. 73, 45 Pac. 1023 (1896); 1 Condee, *California Probate Court Practice*, Sec. 464; 3 *Bancroft's Probate Practice*, 2d Edition, Sec. 732).

If qualification of support payments under the marital deduction provisions is to be governed in part by the principles and standards which were applicable under 1939 Internal Revenue Code Section 812 (b) (5), as appears to have been the intent of Congress, the entire $72,000 of support payments awarded to decedent's widow should qualify for deduction under the marital deduction provisions, as they were reasonably required and actually expended, paid in a form which would make them a part of the widow's estate if not consumed, and did not together with other qualifying property exceed fifty per cent of decedent's "adjusted gross estate."

ARGUMENT.

I.

Under the Rule of Decisions in Which the Commissioner of Internal Revenue Has Acquiesced, Petitioners, at a Minimum, Should Have Been Allowed a Deduction Under 1939 Internal Revenue Code Section 812 (e) for the Support Payments Which Became Vested in Decedent's Widow at the Time of the Probate Court's Order.

"By a decree . . . . the Probate Court . . . . directed the executor of the decedent's estate to pay" to the decedent's surviving spouse a lump-sum support allowance "and that amount was paid to" the decedent's surviving spouse "as directed." If the allowance, once made, would fail under State law upon the happening or failure to happen of an event or contingency, it constitutes a terminable interest and is nondeductible. If the reverse is true, it is deductible." The "*right* to such support is vested upon the creation of such relationships. The necessity in nearly all States that such vested rights may be exercised only by application to the court having jurisdiction of the probate of an estate does not prevent the vesting of such rights nor does the failure to make such application bring such rights within the terminable interest rule. . . . Present the necessary relationship of the applicant to the decedent, the only issue before the Probate Court raised by the application made by this decedent's spouse was the amount of such allowance. The amount thereof under the quoted . . . . statutes is governed largely by the size and nature of the assets of decedent's estate, the mode of life of decedent and her husband prior to decedent's death, and the needs of the surviving spouse. The State court has con-

sidered these criteria and rendered its decision. No other provision of State law which has been pointed to or which research has disclosed would specifically render the amount actually paid in a lump sum to the surviving spouse recoverable by the estate in case of . . . death or remarriage. . . . The allowance here at issue, providing as it does for a single payment, representing the current cost of support of the surviving spouse, and not recoverable by the estate upon the happening or failure to happen of any event or contingency, we hold does not constitute a terminable interest and is deductible from the gross estate."

The foregoing quotation is from the opinion of the court in *Estate of Margaret R. Gale*, 35 T. C. 215, 217-221 (1960). The Commissioner of Internal Revenue has acquiesced in this decision (1962-2 C. B. 4). The entire factual statement in the quotations can be applied to the $42,000 vested lump-sum portion of the $72,000 award to the decedent's widow in the case at bar. The District Court and the Court of Appeals, Petitioners submit, should have held that no less than this $42,000 was deductible under Section 812 (e) of the 1939 Internal Revenue Code as amended.

At the hearing in the District Court on the motions for summary judgment [R. 20] and in the argument before the Court of Appeals, counsel for the United States conceded that this $42,000 of the support allowance paid to decedent's widow vested in her when the Probate Court's order was made, and it is clear under the law of California that support allowance is indefeasibly vested in the surviving spouse at the time of the court order granting it to the extent that it is due and payable at such time. The Supreme Court of the

State of California in the case of *In re Lux*, 114 Cal. 73, 45 Pac. 1023 (1896), held that the surviving spouse's right to widow's allowance payments due and payable prior to her death were vested in her and that her estate was entitled to them. In the *Lux* case the next of kin of the decedent appealed from an order of the court which awarded the widow an allowance of $2,500 a month for her support during the settlement of the estate. During the pendency of the appeal many of the monthly payments were not made and before the decision of the California Supreme Court was rendered Mrs. Lux died. The question was then presented as to the right of her estate to the amounts which had accrued to the date of her death, but which had not been paid. As to this, the court said:

> ". . . the point is made by the appellants that the right died with her as to all the allowance not actually paid her before her death. The views of this court on that point were pretty fully indicated at the oral argument by conversations between counsel and the chief justice. It is sufficient to say that the order, like any money judgment, was the property of the respondent; the appeal merely suspended its operation; but upon its affirmance, if pending the appeal she has died, it goes to her heirs or personal representatives" (p. 81).

See, also, *Bancroft's Probate Practice*, 2d Ed., Vol. 3, Sec. 732 and *California Probate Court Practice*, by Newcomb Condee, Vol. 1, Sec. 464.

The vesting of the accrued $42,000 in the case at bar is clear. In *Estate of Michael G. Rudnick*, 36 T. C. 1021 (1961), vesting was not so clear, but the Commissioner of Internal Revenue has acquiesced in the Tax Court's *Rudnick* decision (1962-1 C. B. 5).

Petitioners submit that the decision in *Estate of Gale, supra,* and *Estate of Rudnick, supra,* in which the Commissioner of Internal Revenue has acquiesced, and other decisions hereinafter mentioned, compel the conclusion that decedent's estate, at a minimum, should have been allowed a deduction under Section 812 (e) for the $42,000 of support payments which became vested in decedent's widow on the date of the Probate Court's order.

II.

The Decision of the Court of Appeals Herein Conflicts With Decisions of the Courts of Appeal for the Fifth and Eighth Circuits and With the Preponderance of Other Recent Decisions on the Issue.

In *United States v. First National Bank & T. Co. of Augusta,* 297 F. 2d 312 (C. A. 5, 1961), the U. S. Court of Appeals, Fifth Circuit, held that support allowance to which the decedent's widow became entitled as of the time of the court's order granting the award was deductible under the marital deduction provisions. The opinion of the court, which is reproduced in the Petition for Writ of Certiorari herein (at Appendix E, pp. 14a through 24a thereof), includes the following:

> "We go further, however, in an effort to squarely meet the issue raised by the government, which rests on the assumption that the amendatory bar or limitation is substantive. Simply stated, it is that the requirement that the widow be in life and widowhood is such an event or contingency within the meaning of § 2056(b) as will render the award terminable, even when it has been made and has under the statute vested indefeasibly.

"To reach this position it is necessary to consider the interest in property passing under § 2056(a) as being the statutory right of the widow to the award at the time of the death of the husband, rather than as being the interest in property itself, once it arises, which is upon the award by the court.

"Certain confines have already been marked out by the courts relative to the meaning of § 2056 and its predecessor, § 812(e) of the Internal Revenue Code of 1939 as amended, as they relate to a widow's support allowance. It was first contended that such an allowance was not an interest in property passing from decedent as defined in these sections. Estate of Rensenhouse, 1956, 27 T.C. 107. On appeal, 6 Cir., 1958, 252 F. 2d 566, this position was abandoned by the government, and was not reasserted on remand to the tax court. 31 T.C. 818 (1960). In addition, the government acceded to the position that such an allowance is an interest passing from the estate of decedent within the meaning of the statute in Estate of Edward A. Cunha, 1957, 30 T.C. 812, affirmed 9 Cir., 1960, 279 F. 2d 292, cert. den. 1961, 364 U.S. 942, 81 S. Ct. 460, 5 L. Ed. 2d 373; Molner v. United States, D.C.N.D. Ill. 1959, 175 F. Supp. 271; Estate of Margaret R. Gale, 1960, 35 T.C. 215; Estate of Michael G. Rudnick, 1961, 36 T.C. No. 105; Estate of William Lamar Hailey, 1961, 36 T.C. No. 8; and most recently in United States v. Quivey, 8 Cir., 1961, 292 F. 2d 252. Cf. Reynolds' Estate v. United States, D.C.E.D. Mich. 1960, 189 F. Supp. 548; Rev. Rul. 83, 1953-1 Cum. Bull. 395; Rev. Rul. 56-26, 1956-1 Cum. Bull. 447.

"Further the rule has been established that the question of the terminability of the interest or award is to be decided upon the law of the state where the interest arose, using the rule of examination of the interest at the time that interest arose, treating that time as being at the time of the court award."

In *E. O. Bookwalter v. M. Phelps, Exrx.*, Dkt. No. 17,339, Dec. 11, 1963, 64-1 USTC 12,203, the U. S. Court of Appeals, Eighth Circuit, held that a $20,000 lump-sum award to the decedent's surviving spouse under Missouri law qualified for deduction under the marital deduction provisions and was not a terminable interest. The court found that under the law of Missouri the right of the surviving spouse vested in her at the date of the decedent's death and that the award once made belonged to the widow and no longer constituted property of the decedent's estate. On the basis of these findings the court refused to follow its prior decision in *United States v. Quivey*, 292 F. 2d 252 (C.A. 8, 1961), and held that the requirements of the marital deduction provisions were satisfied. Similarly, in the case at bar the *right* of decedent's widow to support payments from the estate belonged to her when the decedent passed away and $42,000 of the award to her which was due and payable on the date of the court's order then became her property, not subject to divestment by death or remarriage, and was no longer property of the decedent's estate. *In re Lux*, 114 Cal. 73, 45 Pac. 1023 (1896).

Other recent decisions sustain Petitioners' position with respect to the $42,000 portion of the $72,000 of total support allowance paid to decedent Richards' widow. These include *Estate of William A. Landers*, 38 T. C.

828 (1962); *Estate of P. D. Rensenhouse,* 31 T. C. 818 (1959), on remand 252 F. 2d 566 (C.A. 6, 1958); *Candler v. United States of America,* 61-2 USTC par. 12,045 (1961), aff'd on another point in 303 F. 2d 439 (C.A. 5, 1962); *Molner v. United States of America,* 175 F. Supp. 271 (1959); *Estate of Wm. Paddock,* 20 T. C. M. 1350 (1951); *Reynolds' Estate v. United States of America,* 189 F. Supp. 548 (1960); *Estate of Oliver B. Avery,* 40 T. C. 392 (1963); and *Gardner's Estate v. United States,* 220 F. Supp. 196 (1963).

The opinion of the Court of Appeals herein states two reasons for its decision. Both appear to be erroneous. The first is that a decision for the taxpayer would require the widow's allowance to be "fractionalized" into two interests, one vesting as of the date of the court order and the other not vesting. In support of this the court states: "Section 680, Probate Code, *supra,* contemplates one order for family allowance during the progress of the settlement of the estate but limited in time by the court order. Under the section such order may be made at any time after the granting of letters of administration or letters testamentary. Under appellant's contention, if the court order in question had been made one month after date of death, only one month's allowance would vest and the monthly allowance for the remaining twenty-three months would not, and if the court order had been made at the end of the twenty-four months fixed in the court order, the entire interest vests. No decision cited to us supports the bifurcation suggested by appellant." [R. 38]. Under the law of California, support allowances accrue on a monthly basis (*Estate of Chapman,* 158 Cal. 740, 110 Pac. 302 (1910); *Estate of Coffin,* 16

Cal. App. 2d 532, 61 P. 2d 81 (1936).) On the date of the court order, decedent's estate was indebted to Mrs. Richards in the sum of $42,000. *In re Lux*, 114 Cal. 73, 45 Pac. 1023 (1896).

The California courts have expressly held that Section 680 of the Probate Code does not prohibit there being more than one order for family allowance during the progress of the settlement of an estate. In many estates several such orders are made. *Estate of Broad*, 134 Cal. App. 196, 25 P. 2d 31 (1933); *California Estate Administration* (Continuing Education of the Bar) par. 30.20, p. 723.

The second reason given by the Court of Appeals for its decision herein is that "the term 'property' used in Section 812 (e), as applied to a widow's allowance in California, refers to the assets of the estate and not to the right to receive the allowance" [R. 38] and that the "interest in the property passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow" [R. 38]. In the case at bar, $42,000 of the support allowance belonged to decedent's widow on the date of the court order, and the right to this would have survived her death or remarriage. The "property" is not an inchoate right, but the widow's fixed claim on the date of the order to $42,000 of estate cash.

The judgment of the District Court [R. 27] and that of the Court of Appeals [R. 38] in this matter were founded primarily upon the prior decision of the Court of Appeals in *Estate of Edward A. Cunha*, 279 F. 2d 292 (C. A. 9, 1960). The issue of the deductibility of accrued and unpaid installments of support allowance was neither at issue nor considered by

the Tax Court or by the Court of Appeals in the *Cunha* case. It is submitted that *Cunha* is not valid authority for the judgments in the case at bar with respect to the fourteen monthly payments of $3,000. each which were due and payable to decedent's widow on the date of the Probate Court's order. And if the decision of the Court of Appeals herein holds that this $42,000 did not belong to decedent's widow on the date of the order, such a conclusion is indefensible for the reason that it ignores the terms of the order itself, ignores the law of the State of California, and ignores the concession of counsel for the United States [R. 20]. It is respectfully submitted that at least as to the $42,000 portion of the support allowance awarded to decedent's widow, the judgments of the courts below should be reversed.

III.

Congress Has Expressed Its Intention That Support Payments Be Deductible Under the Marital Deduction Provisions.

The Senate and House Committee Reports indicate that Congress intended that support payments be deductible under the marital deduction provisions (Section 812 (e) of the 1939 Code and Section 2056 of the Internal Revenue Code of 1954). General disallowance of support payments (including the payments in the case at bar) is inconsistent with, and contrary to, the mandate of Congress.

The marital deduction provisions were added to the Internal Revenue Code of 1939 as Section 812 (e) by the Revenue Act of 1948. In 1948 (and prior to 1950) support payments were deductible as a "standard deduction" under Section 812 (b) (5) (Appendix B,

infra), which provided a full deduction from the amount of the gross estate for such sums as were "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent."

By the Revenue Act of 1950 Congress repealed Section 812 (b) (5) and in so doing said that payments of support allowance would continue to be deductible—but under Section 812 (e) rather than 812 (b) (5). The Senate Finance Committee Report specifically stated:

"SECTION 502. REPEAL OF DEDUCTION FOR SUPPORT OF DEPENDENTS.

"This section of the bill, which is identical with section 502 of the bill as passed by the House, amends section 812 (b) of the Code (relating to deductions from gross estate of a decedent) to eliminate, effective with respect to estates of decedents dying after the date of enactment of the bill, the deduction for amounts expended for the support, during the settlement of the estate, of dependents of the decedent.

"Under existing law amounts expended in accordance with the local law for support of the surviving spouse of the decedent are, by reason of their deductibility under section 812(b), not allowable as a marital deduction under section 812(e) of the code. However, as a result of the amendment made by this section, such amounts heretofore deductible under section 812(b) will be allowable as a marital deduction subject to the conditions and limitations of section 812(e)." (S. Rep. No. 2375, 81st Cong., 2d Sess.; 1950 U. S. Code Cong. Serv., Vol. 2, p. 3191; see also H. R. No. 2319, 81st Cong., 2d Sess; 1950-2 C.B. 380, 478).

During the 34 years when Section 812 (b) (5) and its predecessor sections were a part of the "modern" estate tax law* the rules and standards governing the deductibility of support payments became well defined, manageable and workable. The statutory mandate under Section 812 (b) (5) (Appendix B) that support allowances be "reasonably required and actually expended" caused little friction. By the time an estate tax return had been filed and the audit procedure initiated, some 27 months or more had elapsed from the date of the decedent's death and the total allowance awarded to the surviving spouse had usually been paid in full. The representative of the estate and the auditing internal revenue agent generally had no difficulty in agreeing upon the amount to be allowed as a deduction under Section 812 (b) (5).

When support allowances were moved from the "standard deduction" section of the estate tax law to Section 812 (e), did Congress intend to completely eliminate this history, or did it intend only that *"amounts heretofore deductible under Section 812 (b) (5) will be allowable as a marital deduction,"* as it specifically said? If words have meaning, Congress did not intend to emasculate the deduction for support payments, but rather intended to continue the deduction for the same payments made in the same way, subject only to the general scheme of the marital deduction

*The first support allowance provision in the "modern" estate tax law appears in Section 203 of the Revenue Act of 1916. This section permits a deduction in computing the value of the net estate of amounts paid for ". . . support during the settlement of the estate of those dependent upon the decedent . . ." No examination has been made of the 1797 act, which was repealed in 1802, the 1862 act, which was repealed in 1870, the 1894 act, which was held unconstitutional, or the 1898 act, which was repealed in 1902.

provisions which is that property qualifying for a marital deduction should go to the surviving spouse in a way to insure that it would become a part of the surviving spouse's taxable estate if not consumed and that the total amount allowed as a marital deduction should not exceed fifty per cent of the decedent's "adjusted gross estate."

This intention of Congress has been recognized by many decisions, including *United States v. First National Bank & T. Co. of Augusta*, 297 F. 2d 312 (C.A. 5, 1961) and *Estate of William A. Landers*, 38 T. C. 828 (1962).

The general purpose of the marital deduction provisions of the Internal Revenue Code is to equalize the burden of estate taxation between separate property and community property jurisdictions. This was well expressed in the recent decision of this Court in *United States v. D. A. Stapf, Exr.*, Dkt. No. 54, Dec. 2, 1963, 63-2 USTC 12,192, in which Mr. Justice Goldberg, in delivering the opinion of the court, stated:

> "Our conclusion concerning the congressionally intended result under Section 812 (e) (1) accords with the general purpose of Congress in creating the marital deduction. The 1948 tax amendments were intended to equalize the effect of the estate taxes in community property and common-law jurisdictions." (Citing in part H. R. Rep. No. 1274, 80th Cong., 2d Sess., pp. 24-26, and S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 26-29.)

The opinion then notes that ". . . the primary thrust of this is to extend to taxpayers in common-law states the advantages of 'estate splitting' otherwise available only in community property states."

Disallowance of support payments is inconsistent with the "equalization purpose" of the marital deduction provisions in that it discriminates against payments from separate property as contrasted to payments from community property. Without the benefit of a marital deduction, support payments from a community property estate receive more favorable tax treatment than those from a separate property estate. Such payments from community property have the advantages of "estate splitting," whereas payments from separate property do not.

The general purpose of the marital deduction provisions "is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her estate, provided only that the terms of the transfer are such that the property will be taxable in the estate of the surviving spouse." *Estate of Pipe*, 23 T. C. 99, 104 (1954), affirmed 241 F. 2d 210 (C.A. 2, 1957), cert. den. 355 U. S. 814 (1957). (See also *Dougherty v. United States*, 292 F. 2d 331 (C.A. 6, 1961).

In *United States v. D. A. Staff, Exr., supra*, this Court also said:

> "The purpose, however, is only to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. Thus the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate." (Indicating in the footnote that "The congressional concern with the eventual taxability of marital-deduction property is indicated by the terminable interest rule of § 812 (e) (1) (B).")

In the case at bar the widow's allowance was in fact received by the surviving spouse and will be includible in her gross estate if not consumed. The application of the marital deduction to such payments will not permit a tax-free transfer of wealth into the next generation.

IV.

The Terminable Interest Portion of the Marital Deduction Provisions Should Not Apply to Cash Payments of Support Allowance.

The terminable interest portion of the marital deduction provisions is set forth in Section 812 (e) (1) (B) of the Internal Revenue Code of 1939, as amended (Appendix A), and reads in part as follows:

> "812 (e) (1) (B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—
>
> "(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and
>
> "(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

It is apparent from the language of Section 812 (e) (1) (B) (quoted above) that it does not fit situations involving cash payments of support allowance.

After quoting the terminable interest rule, Judge Pierce, in his opinion in *Estate of P. D. Rensenhouse*, 31 T. C. 818 (1959), concurring in part and dissenting in part, states:

"It will be observed that, in order for the marital deduction to be disallowed under this subparagraph, the conditions of clauses (i) and (ii), or of clause (iii), must be met. None of these clauses has the remotest relation to a widow's award; and hence, the condition precedent to the application of said subparagraph to such an award, is not met.

"Moreover, it is obvious from the context of subparagraph (B), that the 'terminable interests' intended to be controlled thereby, are interests passing to a surviving spouse, which are not of such character that they would qualify for taxation in

the surviving spouse's estate—as, for example, a life estate, or an estate for a term of years, or a contingent interest that is subject to curtailment or extinguishment, and to which clauses (i) and (ii) or (iii) would pertain. The subparagraph has, in my view, no application whatever to interests which pass to the widow, *absolutely* for her sole use and consumption.

"Widows' awards simply do not fit into the pattern of subparagraph (B). . . . There is no corpus represented by the award, in which the widow has only a limited or contingent use; there are no remainders; and there is no reverter.

"I would have held that subparagraph (B) is in no way applicable to widows' awards."

To give effect to the clearly expressed intention of Congress, "property", within the meaning of Section 812 (e) (1) as applied to support allowances, must be held to be what the surviving spouse receives. If the support allowance is paid in cash, no interest in the award will terminate or fail or pass to another within the meaning of Section 812 (e) (1) (B). The excerpt from the opinion of the District Court in *Quivey v. United States*, 176 F. Supp. 433 (1959) (reversed 292 F. 2d 252; C. A. 8, 1961), as applied to support allowances paid in cash, would appear to be accurate:

"It is still necessary to define 'property' in order to determine whether the same property in which the widow has an interest may pass to another person. Property as being any and all of the assets of the estate of decedent has already been rejected as having results incompatible with the in-

> tent of Congress. So also must the Commissioner's view of 'property' be rejected. In the view of this Court, the 'property' consists of the assets actually paid to the widow out of the gross estate of the decedent, no more or no less" (p. 439).

The purpose of the marital deduction provisions is to equalize the imposition of estate taxes among residents of the various states, particularly between taxpayers in common-law and community property states. The application of the terminable interest rule to cash support allowance payments makes deductibility dependent upon the vagaries of local law. As Judge Pierce in his opinion in *Kensenhouse* stated: "The meaning and application of federal tax statutes is a federal question, which should be resolved by application of settled principles relating to the construction of federal tax statutes" (p. 826). . . . "In a statute of such fine mesh, I find no room for the inclusion of tests based on the peculiarities and policies of differing state laws, which are not specifically authorized" (p. 827). . . . "It cannot reasonably be inferred that Congress intended that the qualification of widow's awards for the marital deduction, should be subjected to the uncertainties and variations of local law" (p. 829). The present unsettled state of the law with respect to the deductibility of support allowances is due for the most part to the application of the terminable interest rule to situations it was not intended to fit. This situation is recognized by the United States in its memorandum filed in response to the Petition for a Writ of Certiorari herein. On page 3 of the Memorandum For the United States it is said:

> "The issue of the deductibility of widow's allowances under the marital deduction provisions of

the Federal estate tax recurs frequently. The decisions of the lower courts are, if not in conflict, far from consistent in rationale and approach. As in the present case, exceedingly narrow distinctions have been made to reconcile the decisions."

V.

The Measure of Deductibility Under the Marital Deduction Provisions for Cash Support Awards to a Surviving Spouse Should Be Determined to Be "Amounts Reasonably Required and Actually Expended," Subject to the Over-all Fifty Per Cent of Adjusted Gross Estate Limitation.

When the support order was made in decedent Richards' estate on June 30, 1952, $42,000 of the total award had accrued and then vested in decedent's widow, and $30,000 remained to be paid over a period of ten months at the rate of $3,000 a month. The entire $72,000 was in fact paid to Mrs. Richards in cash [R. 1, 7, 24]. It went to her in such a way as to become a part of her taxable estate, and the support allowance, together with other property of decedent's estate qualifying for the marital deduction, did not exceed fifty per cent of decedent's adjusted gross estate [R. 4].

Decisions hereinabove mentioned would deny a deduction under Section 812 (e) for the $30,000 paid to decedent's widow subsequent to the date of the court's order and have resulted in the failure to qualify of many support payments in California and other states.

Petitioners believe that the rule of these cases is not consistent with the intention of Congress and that they incorrectly state the applicability of Section 812 (e) to support allowances. One of the most carefully con-

sidered and well reasoned decisions on the subject is that of the District Court in *United States v. Quivey*, 176 F. Supp. 433 (1959) reversed in 292 F. 2d 252 (C. A. 8, 1961), wherein it is said:

> "Proceeding to the statute and its wording to determine whether the terminable interest rule is applicable to widows' allowances, an examination of the rule as set out there shows that the rule is inapplicable unless the widow's interest terminates or fails and, in addition, an interest in the same property in which the widow holds an interest passes or has passed from the decedent to another person, and such other person may possess or enjoy any part of that property after the termination or failure of the widow's interest in the same. In order to determine whether the widow's interest terminates, or whether an interest in the same property has passed to another person, it is first necessary to determine what constitutes the 'property' and what 'interests' are held in such with regard to this matter before us.
>
> . . . .
>
> "Were it not for the contrary Congressional intent, this Court might be inclined to hold that the 'property' consists of any and all of the assets of decedent's estate, and the 'interest' to be an inherently terminable personal right to an allowance from these assets for support and maintenance, thus denying the marital deduction in all cases of widow's allowances. This classification of the terms must be rejected because its results would be, as mentioned, contrary to the express intent of Congress.
>
> . . . .

"It is still necessary to define 'property' in order to determine whether the same property in which the widow has an interest may pass to another person. Property as being any and all of the assets of the estate of decedent has already been rejected as having results incompatible with the intent of Congress. So also must the Commissioner's view of 'property' be rejected. In the view of this Court, the 'property' consists of the assets actually paid to the widow out of the gross estate of the decedent, no more or no less.

"The legislative history is in accord with this classification. Section 812 (b) (5) of the 1939 Code provided for the deduction of amounts '*actually expended* for the support during the settlement of the estate.' (Emphasis supplied.) One of the intended effects of the repeal of this section was 'to shift the deduction for widows' awards from one subsection of section 812 to another; and thereby place the allowances under the 50 per cent limitation on aggregate marital deductions.' Concurring in part and dissenting in part opinion in Re Estate of Rensenhouse, supra, 31 T.C. at page 829. The 'property' involved in § 812 (b) (5) was the amount actually expended. In accordance with the substitution intended by Congress, the 'property' in § 812(e) and the subsequent, similar § 2056 of the 1954 Code, would consist of the amounts actually paid to the widow. . . .

"In view of these classifications, the terminable interest rule must be ruled inapplicable to the widow's allowance in Nebraska. As the property consists of only those sums actually paid to the

widow, the property is consumed at the termination of the widow's interest, and there exists no property in which the widow held an interest available to pass from the decedent or his estate to some other person who may possess or enjoy such property within the meaning of § 2056(b) (1) (A) and (B). Therefore, those sums actually expended as a widow's allowance under the Nebraska statutes are entitled to the marital deduction under § 2056(a).

"Compelling, although not controlling, this conclusion is the fact that the decedent cannot, either by his will or by statute, pass assets of his estate to the widow and through her into the hands of another by means of a widow's allowance without those assets being subject to an estate tax. Because the primary function of the terminable interest rule is to prevent the escaping of estate taxes by just such means, already unavailable under the widow's allowance, nothing impels me to apply the rule in this case."

The District Court's decision in *Quivey, supra,* was reversed by the Court of Appeals for the Eighth Circuit largely upon the authority of *Estate of Edward A. Cunha v. Commissioner,* 279 F. 2d 292 (C. A. 9, 1960), which was one of the first decisions of a United States Court of Appeals to consider the issue. When *Cunha* is re-read in the light of subsequent United States Court of Appeals decisions, it appears to lose its vitality. For example, what court would say today, as did the court in *Cunha,* that a support allowance will not qualify under the marital deduction provisions if the surviving spouse's right to the allowance might

have been lost had she died prior to the date of the court order? This view is rejected by the United States Court of Appeals for the Fifth Circuit in *United States v. First National Bank & T. Co. of Augusta*, 297 F. 2d 312 (C. A. 5, 1961), and by the United States Court of Appeals for the Eighth Circuit in *Bookwalter v. M. Phelps, Exrx.*, 64-1 USTC 12,203 (C. A. 8, 1963). Such a view has also been rejected by the Tax Court in *Estate of Margaret R. Gale*, 35 T. C. 215 (1960), and *Estate of Michael G. Rudnick*, 36 T. C. 1021 (1961). The Commissioner of Internal Revenue has acquiesced in both the *Gale* and *Rudnick* cases (1962-2 C. B. 4, 5).

Judicial developments since the date of the Ninth Circuit's decision in *Cunha* give a meaning and vitality to the District Court's decision in *United States v. Quivey*, 176 F. Supp. 433 (1959), reversed in 292 F. 2d 252 (1961), and to the concurring in part and dissenting in part opinion of Judge Pierce in *Estate of Rensenhouse*, 31 T. C. 818, 824 (1959).

Petitioners urge that in reviewing the judgments in the case at bar, this Court determine applicable standards for the deduction of support payments which are consistent with the intention expressed by Congress in 1950 that ". . . amounts heretofore deductible under Section 812 (b) will be allowable as a marital deduction . . ." Petitioners submit that "amounts reasonably required and actually expended" for the support of a decedent's surviving spouse were intended by Congress to be allowable under the marital deduction provisions, provided such payments go to the surviving spouse in such a manner as to be includible in the estate of the surviving spouse and provided such pay-

ments, together with other property qualifying for the marital deduction, do not exceed fifty per cent in value of the decedent's adjusted gross estate. Such a determination would do no more than bring former Section 812-(b) (5) deductions within the framework of the marital deduction provisions and promote equality of estate tax treatment for residents of common-law and community property jurisdictions, which is what the Revenue Act of 1948 and the repeal of Section 812 (b) (5) in 1950 sought to accomplish.

Conclusion.

For the reasons hereinabove stated it is respectfully submitted that the judgment of the court below should be reversed.

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Counsel for Petitioners.

January 21, 1964.

APPENDIX A.

Section 812(e) of the Internal Revenue Code of 1939, as Amended.

Sec. 812. Net Estate

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of Marital Deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

APPENDIX B.

Section 812(b)(5) of the Internal Revenue Code of 1939, as Amended.

SEC. 812. NET ESTATE

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(b) Expenses, Losses, Indebtedness, and Taxes.—Such amounts—

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent.

APPENDIX C.

California Probate Code.

Sec. 680. (Right to allowance: Who entitled: Necessity: Duration: Preference: Time of taking effect.) The widow, widower and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which in the case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

Sec. 681. (When may be granted: Power of court: Granting prior to inventory: Subsequent granting or modification: Hearing: Notice.) Such allowance may be granted before the inventory is filed, either by the court or a judge thereof; in which case it shall continue until modified by the court. After the inventory is filed the court may grant such allowance, or may modify any allowance made before the filing of the inventory, upon the petition of any person interested and a hearing after notice given for the period and in the manner required by section 1200 of this code.

Sec. 682. (Where parties have other support: Need for allowance as affecting granting thereof.) If the widow, widower, or any minor child has a reasonable maintenance derived from other property, and there are other persons entitled to a family allowance, the allowance shall be granted only to those who have not such maintenance.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 361

L. R. JACKSON ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court's findings of fact and conclusions of law (R. 28–29) are not officially reported. The opinion of the court of appeals (R. 32–39) is reported at 317 F. 2d 821.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1963. (R. 39.) The petition for a writ of certiorari was filed on August 12, 1963, and was granted on October 28, 1963. (R. 40; 375 U.S. 894.) The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a widow's support and maintenance allowance, payable periodically by the deceased husband's estate pursuant to California law if the widow survives unremarried to the date of the award and to the date of each payment, is deductible from the decedent's gross estate as part of the marital deduction under Section 812(e)(1) of the Internal Revenue Code of 1939.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the California Probate Code, the Internal Revenue Code of 1939, Section 812(e), and the Treasury Regulations under the 1939 and 1954 Codes, are set forth in the Appendix, *infra*, pp. 21–25.

STATEMENT

The decedent, George A. Richards, died testate on May 27, 1951, while a resident of the State of California. He was survived by his widow, Frances S. Richards, and a daughter, Rosene Richards Moore. On June 19, 1951, the decedent's will was admitted to probate and the widow qualified as the executrix of the estate (R. 32). The decedent's will made certain specific bequests and left the residue in trust for the benefit primarily for the decedent's daughter and her issue (R. 32–33).

On June 30, 1952, the Superior Court of the State of California, in and for the County of Los Angeles, authorized and directed the executrix to pay to herself, individually and as the decedent's surviving spouse,

the sum of $3,000 a month from the corpus of the estate for her support and maintenance, pursuant to Section 680 of the Probate Code of California. The allowance was to be paid for the period beginning May 27, 1951, the date of decedent's death, and was to continue until further order of the court, but not exceeding a total period of twenty-four months (R. 33). As of June 30, 1952, the date on which the order was entered, the sum of $42,000 was due and payable to the widow for the period that had already elapsed since her husband's death. That amount and an additional sum of $30,000, or a total of $72,000, was in fact paid to the widow from the corpus of the estate for the full period covered by the court order (R. 33).

On the federal estate tax return filed for the estate, the $72,000 so paid the widow was deducted as part of the marital deduction provided for by Section 812(e) of the Internal Revenue Code of 1939. The Commissioner of Internal Revenue disallowed the deduction and determined a deficiency accordingly. The estate paid the deficiency and in due course brought this suit for refund (R. 33–34). The district court held that the widow's allowance was a "terminable interest" and, hence, was not deductible (R. 28–30). The court of appeals affirmed (R. 34–39).

SUMMARY OF ARGUMENT

1. Since 1948 the federal estate tax law has permitted a "marital deduction" for the value of an interest in property passing from the decedent to his surviving spouse. However, such an interest cannot be deducted if it is "terminable" (*i.e.*, if it "will ter-

minate or fail" upon the occurrence of some event or contingency) and if another interest in the same property has passed to another person who may possess the property after the termination or failure of the widow's interest.

The question in this case concerns the deductibility of sums paid under a state statute which provides for an award to the widow to cover her living expenses during the period of administration of the estate of her husband. It is the government's position that no deduction is allowable if, at the time of the decedent's death, there exists any substantial condition, either precedent or subsequent, to the surviving spouse's right to receive the support allowance. The legislative history makes clear that unless the surviving spouse has an absolute interest in the property passing from the decedent at the time of his death there can be no marital deduction. This has been the accepted rule as to all other property interests. There is no reason for departing from this standard where the interest sought to be deducted is a widow's allowance.

In our view, therefore, a widow's allowance qualifies for the marital deduction only where the state statute grants an absolute vested right to the widow or to her estate at the instant of her husband's death or where, as in the case of a widow's election to take against the will, the widow's right is contingent on nothing more than her own action in demanding the amount. Where local law requires that the widow survive and remain unmarried until a decree is entered, or that she survive and remain unmarried

during the entire period for which she claims an award of periodic payments, there is interposed a substantial contingency beyond her control which is inconsistent with the marital deduction provisions. In this case, the state law is clear that death or remarriage either before a decree is entered or before any periodic payment is due defeats the widow's right. The allowance therefore does not qualify for the marital deduction.

Even if it were permissible to relate the court's decree back to the date of death, the estate would still not be entitled to a marital deduction in this case. Under state law the widow's rights were contingent not merely on surviving to the date of the court's decree but also on surviving to the date of each of the monthly periodic payments she was awarded. That additional contingency, which could have defeated the widow's right to the allowance at any point during the two years of the award, cannot be eliminated by delay in the issuance of the court decree.

2. The "property" in which the widow's allowance is an interest is either the corpus of the decedent's estate or that part of the corpus which would be needed to pay the allowance if she survived unremarried for twenty-four months. Whichever definition of the "property" is adopted, another interest in it has passed to the decedent's daughter and her issue as residuary beneficiaries. Since the decedent's daughter would enjoy an augmented interest in the same property after the failure of some part of the allowance at any time during the administration of

the estate, no part of the allowance can be deducted under the terms of the terminable interest rule.

ARGUMENT

I

A WIDOW'S ALLOWANCE IS A TERMINABLE INTEREST UNDER SECTION 812(e) IF IT IS SUBJECT TO ANY CONTINGENCIES BEYOND THE WIDOW'S ELECTION TO CLAIM THE ALLOWANCE. IN THIS CASE THE ALLOWANCE IS SUBJECT TO THE CONTINGENCIES (1) OF SURVIVAL UNREMARRIED TO THE DATE OF DECREE, AND (2) OF SURVIVAL UNREMARRIED DURING THE PERIOD FOR WHICH EACH SUCCESSIVE PERIODIC PAYMENT IS MADE

INTRODUCTION

The sole issue in this case concerns the deductibility of a widow's allowance under the statutory provision for a marital deduction in computing the estate tax. The controlling statute is Section 812(e)(1)[1] which was added to the Internal Revenue Code of 1939 by the Revenue Act of 1948 (Appendix, *infra*, pp. 21–22). Section 812(e)(1)(A) provides that a marital deduction is allowable in an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate. Section 812(e)(1)(H) provides that the aggregate amount of the marital deduction cannot exceed 50 percent of the decedent's adjusted gross estate. These provisions

[1] The provision in pertinent part appears unchanged in the Internal Revenue Code of 1954 as Section 2056(a) and (b)(1) (26 U.S.C., 1958 ed., Sec. 2056(a) and (b)).

were designed to give estates located in common-law states approximately the same advantage in computing estate tax liability as that enjoyed by estates located in community-property States, where only one-half of the community property is included in the decedent's taxable estate. *United States* v. *Stapf*, 375 U.S. 118, 128, rehearing denied, January 6, 1964; S. Rep. No. 1013, 80th Cong., 2d Sess., p. 5.

However, the right to the marital deduction is not absolute lest the advantage—which Congress sought to equalize between the states—be on the side of the estate in the common-law state. In the community-property state each spouse has a complete interest in one-half of the community property, and, while the wife's one-half will not be taxed in her husband's estate, it is subject to estate taxes at her death unless she has consumed or transferred it by that time. *United States* v. *Stapf, supra.* To assure that property accorded a marital deduction will also be taxed in the survivor's estate, Section 812(e)(1)(B) provides that no deduction shall be allowed where an interest in property passing to the surviving spouse may terminate or fail upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, and where another interest in the property has passed from the decedent to some other person who may possess or enjoy the property after the termination or failure of the spouse's interest. This so-called "terminable-interest" rule was necessary to "equate the decedent in the common-law State with the decedent in the community-property State who cannot by his will affect in any way the sur-

viving spouse's interest in the community property", and its intended effect was to limit the deduction to cases where the decedent passes to the spouse "all of his interest in the property." S. Rep. No. 1013, 80th Cong., 2d Sess., p. 28.

A widow's allowance is solely a product of local law. Some state statutes provide for an award of the allowance in a lump sum; others, like the California statute here involved, provide for support payments over a prescribed period of time. The amount of the award may also be prescribed, or it may be left to the discretion of the probate court. More importantly, however, some state statutes provide that the right to the award vests immediately in the widow upon her husband's death, and, hence, may be claimed by her estate should she die before securing a probate court decree;[2] others condition the award upon the widow's survival without remarriage to the date of a probate court decree;[3] and still others, as here, condition the

[2] The Connecticut statute specifically provides for an immediate vesting of a support allowance (21 Conn. Gen. Stat. Ann., Sec. 45–250), and the laws of Delaware (*In re Hearn's Estate*, 22 Del. Ch. 447, 195 Atl. 367), of Missouri (*Bookwalter* v. *Phelps*, 325 F. 2d 186 (C.A. 8th), of Michigan (*Reynolds' Estate* v. *United States*, 189 F. Supp. 548 (E.D. Mich.)), of Illinois (*Molner* v. *United States*, 175 F. Supp. 271 (N.D. Ill.)), and of Ohio (*In re Estate of Croke*, 155 Ohio St. 434, 99 N.E. 2d 483) have been similarly construed.

[3] As in Georgia (*First Nat. Bank & Trust Co. of Augusta* v. *United States*, 191 F. Supp. 446 (S.D. Ga.), affirmed, 297 F. 2d 312 (C.A. 5th)), in Oregon (*United States Nat. Bank of Portland* v. *United States*, 188 F. Supp. 332 (D. Ore.), in Massachusetts (*Estate of Rudnick* v. *Commissioner*, 36 T.C. 1021), and in Maine (*Estate of Gale* v. *Commissioner*, 35 T.C. 215),

award upon the widow's survival, unremarried, to the date of each periodic payment.[4]

Prior to 1948 the allowance paid to a widow under local law for her support and maintenance pending the administration of her husband's estate was deductible as a cost of estate administration under Section 812(b)(5) of the Internal Revenue Code of 1939 to the extent "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent". The deduction remained undisturbed when the provision for a marital deduction was enacted in 1948. Indeed, the Senate Report accompanying the Revenue Act of 1948 contained the following reference to widows' allowances (S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 3):

> An interest in property does not pass to the surviving spouse from the decedent within the definition in section 812(e)(3) by reason of a claim against the estate, or any indebtedness, in favor of the surviving spouse for which a deduction is allowed by section 812(b). Neither the payments made in satisfaction of such a claim or debt nor the amounts expended in accordance with the local law for support of such surviving spouse during the settlement of the estate pass to such surviving spouse from the decedent within the meaning of section 812(e)(3).

[4] When a change in status occurs after the award in such a case, the right to the allowance abates. *Darby's Estate* v. *Wiseman*, 323 F. 2d 792, 795–796 (C.A. 10th).

In 1950, however, Section 812(b)(5) was repealed by Section 502 of the Revenue Act of 1950, 64 Stat. 906. The committee report stated (S. Rep. No. 2375, 81st Cong., 2d Sess., p. 130):

> This section of the bill, which is identical with section 502 of the bill as passed by the House, amends section 812(b) of the code (relating to deductions from gross estate of a decedent) to eliminate, effective with respect to estates of decedents dying after the date of enactment of the bill, the deduction for amounts expended for the support, during the settlement of the estate, of dependents of the decedent.
>
> Under existing law amounts expended in accordance with the local law for support of the surviving spouse of the decedent are, by reason of their deductibility under section 812(b), not allowable as a marital deduction under section 812(e) of the code. However, as a result of the amendment made by this section, such amounts heretofore deductible under section 812(b) will be allowable as a marital deduction *subject to the conditions and limitations of section 812(e)*.[8] [Emphasis supplied.]

Thus, while Congress at first treated the widow's allowance as a claim against the estate rather than an interest in property "passing" from the decedent, the allowance was later viewed as an interest passing

[8] Congress found it necessary to repeal the specific deduction for the widow's allowance because it felt that the deduction was inconsistent with the concept of the estate tax as a tax on properties transferred at death; that in practice it discriminated in favor of estates located in states having liberal allowances; and that it probably also tended to delay the settlement of estates. See S. Rep. No. 2375, *supra*, pp. 57–58.

by descent which could be deducted, if at all, only if it met the statutory prerequisities for a marital deduction. In view of the changed statutory treatment, it is of course settled that a widow's allowance satisfies the "passing" requirement specified in Section 812(e)(1)(A). *Estate of Rensenhouse* v. *Commissioner*, 252 F. 2d 566 (C.A. 6); see also, Rev. Rul. 83, 1953–1 Cum. Bull. 395; Treasury Regulations on Estate Tax (1954 Code), Section 20.2056(e)–2(a). It is on the application of the "terminable-interest" limitation of Section 812(e)(1)(B) that disagreement has arisen.

The courts agree, as they must, that the value of the award does not qualify for the deduction unless the widow's right to the full allowance is unconditionally vested. *Darby's Estate* v. *Wiseman*, 323 F. 2d 792, 795–796 (C.A. 10); *United States* v. *First National Bank & T. Co. of Augusta*, 297 F. 2d 312, 316–317 (C.A. 5). But the courts have split on the question as to when the terminable-interest rule is to be applied, some holding that the widow's right must be vested at the time of her husband's death (*Cunha's Estate* v. *Commissioner*, 279 F. 2d 292 (C.A. 9), certiorari denied, 364 U.S. 942, rehearing denied, 368 U.S. 870; *United States* v. *Quivey*, 292 F. 2d 252 (C.A. 8)), while the Fifth Circuit has held that it is sufficient if vesting occurs at the time of the probate court decree (*United States* v. *First National Bank & T. Co. of Augusta*, *supra*, pp. 316–317).*

*This disagreement also exists between the lower federal courts. Compare *United States Nat. Bank of Portland* v. *United States*, 188 F. Supp. 332 (D. Ore.); *Reynolds' Estate*

We shall first show that Congress plainly intended the terminable interest rule to be applied at the time the interest passes from the decedent, *i.e.*, at the date of death. We shall then show that even if the date of decree were adopted as the general rule, the allowance in this case would still be a terminable interest.

A. SECTION 812(e) MAKES THE DATE OF DEATH THE RELEVANT TIME FOR DETERMINING WHETHER A WIDOW'S ALLOWANCE IS A TERMINABLE INTEREST AND, AT THAT DATE, THE WIDOW'S INTEREST IN THIS CASE WAS TERMINABLE

A terminable interest, being an interest subject to a condition precedent or subsequent, can, of course, always become vested upon the occurrence of the event upon which it is contingent. Accordingly, it is necessary that the interest passing to the surviving spouse be characterized with reference to some specific point in time. The Senate Committee Report explaining the provision left no doubt what point of time was intended: in determining whether an interest is a nondeductible terminable interest, it said, "the situation is viewed as at the date of the decedent's death." S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 10. See also the last paragraph of section 812(e)(3) of the 1939 Code, providing specifically that the person to whom an interest passes is to be determined "at the time of the decedent's death."

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v. *United States*, 189 F. Supp. 548 (E.D. Mich.), and *Estate of Rensenhouse* v. *Commissioner*, 31 T.C. 818, with *Second National Bank of New Haven* v. *United States*, 222 F. Supp. 446 (D. Conn.), *Estate of Landers* v. *Commissioner*, 38 T.C. 828, *Estate of Gale* v. *Commissioner*, 35 T.C. 215, and *Estate of Rudnick* v. *Commissioner*, 36 T.C. 1021.

'In the light of that history, the courts have uniformly agreed, in dealing with interests other than a widow's allowance, that the right to a marital deduction is to be determined at the instant of the decedent's death.' *Bookwalter* v. *Lamar*, 323 F. 2d 664 (C.A. 8); *United States* v. *Mappes*, 318 F. 2d 508 (C.A. 10); *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3); *Starrett* v. *Commissioner*, 223 F. 2d. 163 (C.A. 1); *Estate of Sbicca* v. *Commissioner*, 35 T.C. 96; *Ballentine* v. *Tomlinson*, 293 F. 2d 311, 312 (C.A. 5). It is the Government's position that the same rule applies to a widow's allowance and that the existence at the time of the decedent's death of any substantial condition, either precedent or subsequent, to the surviving spouse's right to receive a support allowance makes the right to the allowance a terminable interest not qualifying for the marital deduction.

It is clear that when Congress repealed the specific deduction for widows' allowances as an administrative expense, it intended the deductibility of such awards thereafter to be governed, in the same manner as any other interest, by the marital deduction provisions including the exception for terminable interests. See

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'The sole exception to this rule is one sharply limited by the statute which creates it. Under Section 812(e)(1)(D), an interest is not to be considered terminable if it will fail *only* if the widow dies within six months of her husband's death (and she in fact survives that period). The condition of survival in the present case—to the date of the court decree and to the date of each payment—will cause the widow's allowance to fail even if death occurs after the six-month period. Moreover, the condition of remaining unremarried is not excepted from the general rule by Section 812(e)(1)(D).

S. Rep. No. 2375, 81st Cong., 2d Sess., p. 130, *supra*, p. 10; *Cunha's Estate* v. *Commissioner, supra; United States* v. *Quivey, supra;* Rev. Rul. 83, 1953–1 Cum. Bull. 395; Rev. Rul. 56-26, 1956–1 Cum. Bull. 447; Treasury Regulations on Estate Tax (1954 Code), Section 20.2056(b)–1(g), Example (8), and Section 20.2056(e)–2(a). There is no reason for applying the terminable-interest rule any differently to widows' allowance than to other interests passing to a surviving spouse. Indeed, the Senate twice declined. House-passed measures (see S. Rep. No. 1622, 83d Cong., 2d Sess., p. 125, and H.R. 2573, 86th Cong., 1st Sess.) which would have allowed, without qualification, a marital deduction for allowances paid to a widow within specified periods following the decedent's death.

If the terminable-interest limitation is to be applied to widows' allowances in the same manner as it is to other interests—*i.e.*, characterizing the interest as of the time of the decedent's death—whether an allowance is deductible or not will depend on its incidents under local law. Where state law grants an absolute vested right to the widow or to her estate at the instant of her husband's death, the allowance will qualify for the marital deduction. But, where local law conditions the award upon the widow's survival unremarried either until a decree is entered or throughout the period for which the allowance is made, there is interposed a substantial contingency beyond the widow's control, and the allowance is, therefore, a

nondeductible terminable interest. Cf. *Bookwalter* v. *Lamar, supra; United States* v. *Mappes, supra.*[8]

Those courts which have disregarded such substantial pre-decree contingencies, thus permitting a deduction where the allowance is contingent upon survival to the time of a judicial decree, may have been misled by the fact that a marital deduction is allowed for the value of property received under state law where the widow elects to take against the decedent's will.[9] See *United States* v. *First National Bank & T. Co. of Augusta, supra,* p. 317. Where, under state law, a widow obtains a fixed right to claim a non-terminable interest at her husband's death, the mere procedural requirement that the widow signify her election or file her claim—which she might do immediately—does not make the interest meaningfully contingent. Her election to take the interest is therefore deemed to relate back to the date of the decedent's death, and the marital deduction is permitted with respect to the property actually passing and vesting. *Dougherty* v. *United States,* 292 F. 2d 331 (C.A. 6); *United States* v. *Crosby,* 257 F. 2d 515 (C.A. 5); *United States* v. *Traders National Bank of Kansas*

[8] The acquiescence by the Internal Revenue Service (1962-1 Cum. Bull. 4) in *Estate of Gale* v. *Commissioner*, 35 T.C. 215, and *Estate of Rudnick* v. *Commissioner*, 36 T.C. 1021, was inconsistent with our present position, but action to substitute nonacquiescence has been withheld pending the outcome of this litigation.

[9] Treasury Regulations on Estate Tax (1954 Code), Section 20.2056(e)-2(a)(4).

City, 248 F. 2d 667 (C.A. 8).[10] Similarly, there is no objection to allowing the marital deduction for a widow's allowance in a state whose law gives the widow an absolute right to claim an allowance upon the decedent's death, with the allowance, once claimed, being thereafter payable to her or to her estate regardless of her survivorship. But there can be no marital deduction where the local law, in addition to requiring an election or filing of a claim, prescribes that the widow must survive until a particular point in time to receive the allowance. In that situation there is nothing which the widow can do, at the instant of her husband's death, which will guarantee receipt by her or by her estate of the interest so elected.

The application of those principles to the facts of this case is straightforward. A California widow's allowance is subject to the condition that the widow must survive and remain unmarried both until the date of the court decree and during the periods for which each successive monthly payment is made. *Estate of Blair*, 42 Cal. 2d 728, 269 P. 2d 612; *In re Lux's Estate*, 114 Cal. 73, 45 Pac. 1023; *Estate of Hamilton*, 66 Cal. 576, 6 Pac. 493. Those contingencies, prescribed by local law, make the allowance a

[10] But see *United States* v. *Hiles*, 318 F. 2d 56 (C.A. 5). Under the facts of that case the widow had no right under the Alabama statutes to receive cash in lieu of common-law dower. The local probate court, however, made a cash award to the widow pursuant to its alleged equitable powers, and the appellate court held that this cash award qualified for the marital deduction. We do not believe that the probate court award in *Hiles* comes within the purview of Section 20.2056(e)-2(a)(4) of the 1964 Code Regulations and, consequently, we believe the case was incorrectly decided.

terminable interest at the time of the spouse's death. It is therefore not deductible under Section 812(e).

B. EVEN IF THE COURT DECREE WERE TO BE RELATED BACK TO THE DATE OF DEATH, THE ALLOWANCE IN THIS CASE WOULD BE A TERMINABLE INTEREST

Even at the date of the court's decree in this case, the widow's right to receive the last ten monthly payments of $3000 remained subject to the contingency of her survival to the date of each payment. It is accordingly plain that this part of the award was not deductible regardless of whether the award is viewed at the date of death or at the date of decree. The petitioner contends, however, that because fourteen monthly payments had already accrued at the date of decree, the sum of $42,000 is deductible if the terminable interest rule is to be applied, as petitioner contends, at the date of decree. (Br. 7–15, 20–24). We submit that even if the interest were properly to be characterized by relating the probate decree back to the moment of the decedent's death, the $42,000 would still not be deductible.

A holding that the date of decree was controlling could only mean that conditions of survival and failure to remarry to the time of decree would not defeat the marital deduction—*i.e.*, that the decree, like a widow's election to take against a will, should be related back to the date of death. But even relation-back would not eliminate the other contingencies making the award in this case uncertain. Thus, for example, a condition that the widow must survive for eight months to receive an interest is a classic example of a terminable interest. See *supra*, p. 13,

n. 7. If the right to receive a widow's allowance is subject to the same condition, it cannot be made deductible simply by delaying the court decree until after eight months have passed. This is such a case, for the widow's right to an allowance of $42,000 was conditioned on her survival for fourteen months. This condition, which is far more than a mere requirement of survival to the date of decree, cannot be eliminated by the happenstance of the timing of the court award. Indeed it was recognized even in *United States* v. *First National Bank & T. Co. of Augusta*, 297 F. 2d 312, 316–317 (C.A. 5), that no deduction is permissible in a case of monthly payments where, as here, the widow must survive unremarried to the date of each payment. See also, *Darby's Estate* v. *Wiseman*, 323 F. 2d 792, 796 (C.A. 10).

II

THE WIDOW'S ALLOWANCE IN THIS CASE IS NOT DEDUCTIBLE BECAUSE ANOTHER INTEREST IN THE SAME PROPERTY HAS PASSED FROM THE DECEDENT TO ANOTHER PERSON WHO MAY ENJOY THE PROPERTY AFTER THE TERMINATION OR FAILURE OF THE ALLOWANCE

Under the terms of Section 812(e)(1)(B), an interest in property is not deductible if, upon the occurrence of an event, it will terminate and if another interest in the same property has passed to some other person, who may enjoy some part of the property after the termination of the widow's interest. In this case, the "property" in which the widow's allowance was an "interest" was either all of the underlying assets which formed the corpus of the decedent's

estate (*Cunha's Estate* v. *Commissioner, supra,* p. 298; *United States* v. *Quincy, supra,* p. 255; S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4) or, at the very least, so much of the corpus as was subject to the widow's claim—*i.e.*, the part that would be needed to pay the full allowance if the widow survived the twenty-four months without remarrying. Under either definition of the "property," the widow's allowance, consisting of a right to periodic payments, was an interest in the "property" which would terminate or fail upon the occurrence of an event (her death or marriage). It is equally plain that another interest in the same "property" passed to some other person (the decedent's daughter as residuary legatee) who would enjoy some part of the property upon the termination of the widow's interest. The allowance, therefore, constituted a nondeductible terminable interest within the meaning of Section 812(e)(1)(B). See *Meyer* v. *United States,* 364 U.S. 410.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

California Probate Code, 53 West's Annotated California Codes:

SEC. 680. *Right to allowance; preference in payment; time of commencement*—The widow, widower, minor children, and adult children who have been declared incompetent by order of court are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

SEC. 681. *Time of grant; continuance; modification*—Such allowance may be granted before the inventory is filed, either by the court or a judge thereof; in which case it shall continue until modified by the court. After the inventory is filed the court may grant such allowance, or may modify any allowance made before the filing of the inventory, upon the petition of any person interested and a hearing after notice given for the period and in the manner required by section 1200 of this code.

SEC. 682. *Maintenance derived from other property; allowance to other members of family*—If the widow, widower, or any minor child has a reasonable maintenance derived from other property, and there are other persons entitled to a family allowance, the allowance shall

be granted only to those who have not such maintenance.

* * * * *

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [as added by Sec. 361(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

* * * * *

(D) *Interest of Spouse Conditional on Survival for Limited Period.*—For the purposes of

subparagraph (B) an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail upon the death of such spouse if—

(i) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(ii) such termination or failure does not in fact occur.

* * * * * * *

(H) *Limitation on Aggregate of Deductions.*—The aggregate amount of the deductions allowed under this paragraph (computed without regard to this subparagraph) shall not exceed 50 per centum of the value of the adjusted gross estate, as defined in paragraph (2).

* * * * * * *

Treasury Regulations 105 (1939 Code):

SEC. 81.47b [as added by T.D. 5699, 1949 Cum. Bull. 181, 202, and amended by T.D. 6082, 1954–2 Cum. Bull. 295, 297]. *Nondeductible interests.*—

* * * * * * *

(*d*) *Interest in property which another person may possess or enjoy.* Section 812(e)(1)(B) provides that no marital deduction shall be allowed with respect to certain property interests (referred to generally as "terminable interests") which passed from the decedent to his surviving spouse, in case—

(1) An interest in the same property passed at any time (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such spouse (or the estate of such spouse), and

(2) By reason thereof, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse.

The foregoing provision is applicable only where interests in the same property passed from the decedent both to his surviving spouse, and to some other person (for less than an adequate and full consideration in money or money's worth), and is applicable irrespective of whether both such interests passed from the decedent at the same time or under the same instrument. Under such circumstances, if the other person to whom an interest passed may, by reason thereof, possess or enjoy any part of the property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse, the latter interest is a "nondeductible interest." As to the meaning of the term "passed from the decedent to a person other than his surviving spouse," see paragraph (b) of section 81.47a.

In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property," as such term is used in section 812(e), and an "interest in property." The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property."

Interests which passed to a person other than the surviving spouse include interests so passing under the decedent's exercise, release, or nonexercise of a nontaxable power to appoint. It is immaterial whether the property interest which passed from the decedent to a person other than his surviving spouse is included in the decedent's gross estate.

* * * Whether there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.

* * * * *

Treasury Regulations on Estate Taxes (1954 Code):

SEC. 20.2056(b)-1 *Marital deduction; limitation in case of life estate or other "terminable interest"*—(a) *In general.* Section 2056(b) provides that no marital deduction is allowed with respect to certain property interests, referred to generally as "terminable interests," passing from a decedent to his surviving spouse. The phrase "terminable interest" is defined in paragraph (b) of this section. * * *

(b) *"Terminable interests."* A "terminable interest" in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Life estates, terms for years, annuities, patents, and copyrights are therefore terminable interests. However, a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity or a term for years, is not a terminable interest.

(c) *Nondeductible terminable interests.* (1) A property interest which constitutes a terminable interest, as defined in paragraph (b) of this section is nondeductible if—

(i) Another interest in the same property passed from the decedent to some other person for less than an adequate and full consideration in money or money's worth, and

(ii) By reason of its passing, the other person or his heirs or assigns may possess or enjoy any part of the property after the

termination or failure of the spouse's interest.

* * * * *

(e) *Miscellaneous principles.* (1) In determining whether an interest passed from the decedent to some other person, it is immaterial whether interests in the same property passed to the decedent's spouse and another person at the same time, or under the same instrument.

(2) In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property," as such term is used in section 2056, and an "interest in property." The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property."

* * * * *

(g) *Examples.* The application of this section may be illustrated by the following examples, in each of which it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse did not pass for an adequate and full consideration in money or money's worth:

* * * * *

Example (8). Assume that pursuant to local law an allowance for support is payable to the decedent's surviving spouse during the period of the administration of the decedent's estate, but that upon her death or remarriage during such period her right to any further allowance will terminate. Assume further that the surviving spouse is sole beneficiary of the decedent's estate. Under such circumstances, the allowance constitutes a deductible interest since any part of the allowance not receivable by the surviving spouse during her lifetime will pass to her estate under the terms of the decedent's will. If, in this example, the decedent be-

queathed only one-third of his residuary estate to his surviving spouse, then two-thirds of the allowance for support would constitute a nondeductible terminable interest.

(26 C.F.R., Sec. 20.2056(b)–1.)

SEC. 20.2056(e)–2 *Marital deduction; definition of "passed from the decedent to his surviving sponse"*—(a) *In general.* * * * An allowance or award paid to a surviving spouse pursuant to a local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse. In determining whether or not such an interest is deductible, however, see generally the terminable interest rules of § 20.2056(b)–1 and especially example (8) of paragraph (g) of that section.

* * * * *

(26 C.F.R., Sec. 20.2056(e)–2.)

SEC. 20.2056(e)–2 *Marital deduction; definition of "passed from the decedent to a person other than his surviving spouse".* The expression "passed from the decedent to a person other than his surviving spouse" refers to any property interest which, under the definition stated in § 20.2056(e)–1 is considered as having "passed from the decedent" and which under the rules referred to in § 20.2056(e)–2 is not considered as having "passed from the decedent to his surviving spouse." * * * Whether or not there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.

(26 C.F.R., Sec. 20.2056(e)–3.)

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IN THE

Supreme Court of the United States

October Term, 1963
No. 361

L. R. JACKSON *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

ARGUMENT.

I.

Respondent's Argument That the Terminable Interest Rule Is Applicable to Support Allowances Paid in Cash Is Not Well Founded.

The Brief for the United States herein is limited to the argument that the allowance paid to decedent Richards' widow is a terminable interest. For the reasons stated in the Brief for the Petitioners (pp. 20-24) filed in this Court on January 22, 1964, it is believed that the terminable interest portion of the marital deduction provisions should not apply to cash payments of support allowance and that "property" within the meaning of Section 812(e)(1) as applied to cash sup-

port allowances, should be held to be what the surviving spouse receives.

Senate Report No. 2375 of the 81st Congress, 2d Session, set forth on page 16 of the Brief for the Petitioners, includes the following statement: "However, as a result of the amendment made by this section, such amounts heretofore deductible under Section 812(b) will be allowable as a marital deduction subject to the conditions and limitations of Section 812(e)." Petitioners submit that this language was intended to mean that support allowances would be deductible under the marital deduction provisions, provided there is compliance with the *condition* that the support allowance be paid to the decedent's surviving spouse, the *condition* that the allowance be paid from property included in the gross estate, the *condition* that the support allowance be paid in property (such as cash) which will be taxable in the estate of the surviving spouse, and the *limitation* that the support allowance, together with other amounts deductible under the marital deduction provisions, not exceed fifty per cent of the decedent's adjusted gross estate. The intent of Congress that support payments be allowed under the marital deduction provisions is clear from Senate Report No. 2375, mentioned above, and from the Senate Finance Committee's Report on the Internal Revenue Code of 1954,[1] which includes the following:

> "Your committee rejected a special provision added by the House that allowed widows' allowances to qualify for the marital deduction to the extent paid within 1 year of the decedent's death.

[1] U. S. Code Congressional and Administrative News, 83d Cong., 2d Sess., 1954, Vol. 3, p. 4621, at 4759.

Under present law many widows' allowances qualify for the marital deduction without regard to the time of payment. It is believed that the House bill might raise some question as to the treatment under the marital deduction of these widows' allowances to the extent not received within 1 year of the decedent's death." (Emphasis added.)

The Senate Finance Committee's desire not to restrict the deductibility of support allowance payments under the marital deduction provisions was also evidenced in 1959 by its failure to act upon a bill passed by the House (H.R. 2573, 86th Cong., 1st Sess.) which would also have restricted the deductibility of support allowances.

From the opinion of the Court of Appeals in *Dougherty v. United States*, 292 F. 2d 331 (C. A. 6, 1961), it appears that the decedent's widow elected to take against the will and had her dower right converted, pursuant to Kentucky law, to a cash payment. Decedent's executors claimed the cash payment as a deduction under the marital deduction provisions. This claim was disallowed, the additional tax due by reason of the disallowance was paid, and following denial of a claim for refund, the action was instituted. The United States contended that the terminable interest rule applied. At page 337 of its opinion the court said:

"The problem here involved has been heretofore considered by the Court of Appeals in the Eighth and the Fifth Circuits. United States v. Traders National Bank of Kansas City, supra, 8 Cir., 248 F.2d 667; United States v. Crosby, supra, 5 Cir., 257 F.2d 515. In both of these cases the Court held that the money received by the widow was

not a terminable interest. We agree with the ruling in those cases and with the reasoning of the Court in support of such ruling. As stated in the Crosby case, the provisions of the Internal Revenue Code applicable to the facts of this case should be liberally construed and applied to the purpose of their enactment. The purpose of the provision was to extend to married taxpayers in common law states the advantages of residents of community property jurisdictions by permitting a surviving spouse to acquire, free from estate tax exaction, one-half of what is referred to as the adjusted gross estate of the deceased spouse. Generally speaking, the 'terminable interest' concept was devised for the purpose of assuring that if the property bequeathed to the spouse was to be excluded from the gross estate of the decedent, it would be adequately integrated in the spouse's estate so that on her death, it would not escape the death tax a second time. 'The basic principle * * * is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her estate, provided only that the terms of the transfer are such that this property will be taxable in the estate of the surviving spouse.' Estate of Pipe v. Commissioner, 23 T.C. 99, 104. *Under this construction of the Act, we are more concerned with what the widow actually received in the settlement of her husband's estate than with what she was technically entitled to receive but actually did not receive.*" (Emphasis added.)

The terminable interest argument was also made by the Commissioner of Internal Revenue in *Estate of William A. Landers, Sr.*, 38 T. C. 828 (1962). In response to this the Tax Court, at page 837 of its opinion, says:

> ". . . Under such a restrictive interpretation of section 2056(b), there is hardly any State in which the widow's support allowance would qualify. Cf. *In re Dillman's Estate*, 8 Ill.App.2d 239, 131 N.E. 2d 634 (1956). It is clear to us that Congress could not have intended so narrow a reading of that section. See *Estate of Proctor D. Rensenhouse*, 31 T.C. 818 (1959) (including Judge Pierce's concurring and dissenting opinion, especially at page 829).
>
> "Prior to 1950, amounts expended for widow's support allowances (generally during the entire period of administration) were deductible as administration expenses under section 812(b)(5) of the 1939 Code, subject to the provisions therein (reasonable in amount). By section 502 of the Revenue Act of 1950, Congress repealed section 812(b)-(5) with the following explanations (S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 483, 525, 576):
>
> (Quotation from S. Rept. No. 2375 omitted)
>
> "This history convinces us that Congress still intended, in general, that the support allowances would be deductible. However, because the allowances in some States were thought to be excessive, it desired to bring the allowance within the limits of the marital deduction provisions (espe-

cially the aggregate 50-percent limitation, see section 2056(c)). See *Estate of Edward A. Cunha*, 30 T.C. 812 (1958); affd. 279 F.2d 292 (C.A. 9, 1960); *Estate of Proctor D. Rensenhouse, supra*; *Quivey v. United States*, 176 F. Supp. 433 (D. Nebr. 1959), revd. 292 F.2d 252 (C.A. 8, 1961).

"We have already held in the case of an estate administered in a jurisdiction with laws much like that of Georgia, that the widow's allowance qualified. *Estate of Margaret R. Gale*, 35 T.C. 215 (1960) (Maine law). In *Gale* we recognized (p. 220) that under the decisional law of Maine the widow's rights were defeated if she did not survive until the final decree is made. But, inasmuch as the widow's right was indefeasibly vested *once it was acquired* we allowed the deduction. The only conceivable distinction between our case and *Gale* is that here the controlling State law is statutory and in Maine it was court-made. Manifestly, this is a distinction without a difference. We feel that the *Gale* case is fully controlling here. See also *Estate of Michael G. Rudnick*, 36 T.C. 1021 (Mass. law)." (Footnote omitted.)

On June 30, 1952, the date on which the order was entered in the Richards Estate, Mrs. Richards was entitled to $42,000.00. This amount was vested in her. Neither death nor remarriage would have affected her right or the right of her estate to collect this amount. (*Estate of Blair v. Ruoff*, 42 Cal. 2d 728, 269 P. 2d 612 (1954); *In re Lux*, 114 Cal. 73, 45 Pac. 1023

(1896); 1 Condee *California Probate Court Practice*, Sec. 464; 3 Bancroft's *Probate Practice*, 2d Edition, Sec. 732.) This right would not terminate, fail or pass to another in any event. It should have been held to qualify under the marital deduction provisions. There was no interest in this property (the $42,000.00 cash) which had, could or did pass to another person. It was not a terminable interest. (*United States v. First National Bank & T. Co. of Augusta*, 297 F. 2d 312 (C.A. 5, 1961); *Bookwalter v. M. Phelps, Exrx.*, 325 F. 2d 186 (C.A. 8, 1963); *Estate of William A. Landers, Sr.*, 38 T. C. 828 (1962); *Estate of Michael G. Rudnick*, 36 T. C. 1021 (1961) (Acq. 1962-2 C.B. 5); *Estate of Margaret R. Gale*, 35 T. C. 215 (1960) (Acq. 1962-2 C.B. 4); *Estate of Wm. Paddock*, 20 T. C. M. 1350 (1951).)

With reference to the ten future monthly payments of $3,000.00 each to which Mrs. Richards was entitled under the June 30, 1952, order and which she did in fact receive, Petitioners urge that the "terminable interest rule" is not applicable to cash support payments to a surviving spouse. (*Dougherty v. United States, supra; Estate of Proctor D. Rensenhouse*, 31 T. C. 818 (1959), (opinion of Judge Pierce concurring in part and dissenting in part); S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 576.)

II.

Even Under an Assumption That the Terminable Interest Rule Is Applicable to Support Allowances Paid in Cash, Petitioners Submit That the Amounts Paid to Decedent's Widow Should Be Held to Qualify Under the Marital Deduction Provisions.

Even though it be assumed, for the purpose of discussion, that the terminable interest rule is applicable to cash support allowances, it is believed that a proper application of the rule is not prejudicial to the position taken by Petitioners. At page 15 of the Brief for the United States it is said:

> "... a marital deduction is allowed for the value of property received under state law where the widow elects to take against the decedent's will. See *United States v. First National Bank & T. Co. of Augusta, supra,* p. 317. Where, under state law, a widow obtains a fixed right to claim a nonterminable interest at her husband's death, the mere procedural requirement that the widow signify her election or file her claim—which she might do immediately—does not make the interest meaningfully contingent. Her election to take the interest is therefore deemed to relate back to the date of the decedent's death, and the marital deduction is permitted with respect to the property actually passing and vesting. *Dougherty v. United States,* 292 F. 2d 331 (C.A. 6); *United States v. Crosby,* 257 F.2d 515 (C.A. 5); *United States v. Traders National Bank of Kansas City,* 248 F.2d 667 (C. A. 8)." (Footnotes omitted.)

Why should the rule be less generous for a widow claiming a support allowance from her deceased husband's estate than for a widow electing to take against her husband's will? The *right* to the support allowance is obtained at the time of the husband's death, as is the *right* to take against the will, or a *right* to contest the will and have it set aside. Either as a matter of law or otherwise, these rights of the widow may be lost by inaction or by death, but the *right* exists at the time of death, and as stated by Respondent's brief (page 15): "Her election to take the interest is therefore deemed to relate back to the date of the decedent's death, and the marital deduction is permitted with respect to the property *actually passing and vesting*. (Emphasis added.) The *value* of any right, as opposed to its existence, cannot be ascertained at the time of the decedent's death, and in any estate events occur subsequent to the time of death which affect rights therein and the value of many interests, including those qualifying for the marital deduction. In some estates all rights to beneficial interests are totally destroyed by claims of creditors and other events occurring subsequent to the time of death. The value of a surviving spouse's right to a support allowance will be determined by the property *actually passing and vesting*.

On the date of decedent's death, May 27, 1951, decedent's widow had a *right* to a support allowance. When the court order was entered on June 30, 1952, the value of this right was determined, in part, and Mrs. Richards or her estate was then entitled to the sum of $42,000 cash. Neither death nor remarriage could have affected her right or that of her estate to collect this sum. The right to the $42,000 cash

would not terminate, fail, or pass to another in any event.

With regard to the ten future monthly payments of $3,000 each to which Mrs. Richards was entitled under the court's order, and which she did in fact receive, each passing month gave fruition to a *right* which she had at the time of decedent's death and which gave her an additional $3,000 claim against the estate which neither death nor remarriage could have affected, a claim against the estate which vested absolutely and in which no other person had any interest. "Her election to take the interest is therefore deemed to relate back to the date of the decedent's death, and the marital deduction is permitted with respect to the property *actually passing and vesting.*" (Emphasis added.) (Resp. Br. p. 15.)

Conclusion.

For the reasons stated in the Brief for the Petitioners and in this Reply Brief, it is respectfully submitted that a deduction should have been allowed under the provisions of 1939 I. R. C. Section 812(e) for the $72,000.00 of support allowance paid to decedent's widow, and that the judgment of the court below should be reversed.

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